No. 01-419-CFX Title: City of Columbus, et al., Petitioners
v.
Ours Garage and Wrecker Service, Inc., et al.

Docketed: September 7, 2001 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Sep 7 2001	Petition for writ of certiorari filed. (Response due November 6, 2001)
	Sep 28 2001	Order extending time to file response to petition until November 6, 2001.
	Nov 6 2001	Brief amici curiae of Kansas, et al. filed.
	Nov 6 2001	Brief of respondents Ours Garage and Wrecker Service, Inc., et al. in opposition filed.
	Nov 6 2001	Brief amici curiae of International Municipal Lawyers Association, et al. filed.
	Nov 6 2001	Brief amici curiae of City of Toledo, et al. filed.
	Nov 13 2001	Reply brief of petitioners City of Columbus, Ohio, et al. filed.
	Nov 14 2001	DISTRIBUTED for Conference of November 30, 2001
	Nov 28 2001	REDISTRIBUTED for Conference of January 4, 2002
	Dec 19 2001	Supplemental brief of respondents filed.
	Jan 4 2002	Petition GRANTED. SET FOR ARGUMENT April 23, 2002. **********
	Feb 19 2002	Brief amicus curiae of United States filed.
	Feb 19 2002	Brief of petitioners City of Columbus, Ohio, et al. filed.
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	Brief amicus curiae of Miami-Dade County filed.
	Feb 19 2002	Brief amici curiae of City and County of San Francisco, et al. filed.
	Feb 19 2002	Brief amicus curiae of Coalition for Local Sovereignty filed.
	Feb 19 2002	Brief amici curiae of Kansas, et al. filed.
	Feb 19 2002	Brief amicus curiae of City of Dallas filed.
	Feb 19 2002	Brief amici curiae of City of Toledo, et al. filed.
	Feb 28 2002	Record filed.
	Mar 1 2002	CIRCULATED.
	Mar 13 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 18 2002	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Mar 21 2002	Brief amicus curiae of Towing and Recovery Association of America filed.
	Mar 21 2002	Brief amicus curiae of Cargo Airline Association filed.
	Mar 21 2002	Brief amici curiae of American Trucking Associations, Inc., et al. filed.
	Mar 21 2002	Brief of respondents Ours Garage and Wrecker Service, Inc., et al. filed.
	Mar 21 2002	Brief amicus curiae of California Dump Truck Owners Association filed.

No. 01-419-CFX

Entry	Date	Proceedings and Orders
	Mar 21 2002	Brief amici curiae of VRC LLC, Austin Towing Association, et al. (TTP) filed.
	Apr 1 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 1 2002	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
	Apr 15 2002	Reply brief of petitioners City of Columbus, Ohio, et al. filed.
	Apr 23 2002	ARGUED.

Supreme Court, U.S.
FILED

01 419 SEP 07 2001

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street, Suite 200
Columbus, Ohio 43215

JEFFREY S. SUTTON
Counsel of Record
TRACI L. JONES
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Columbus, (2) the Director of Public Safety for the City, Mitchell Brown, and (3) the License Supervisor of the Public Safety Department for the City, Bobbie Beavers. Respondents are (1) Ours Garage and Wrecker Service, Inc., and (2) the Towing and Recovery Association of Ohio.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

I. The Question Presented Has Divided The Lower Courts 7

A. The Fifth, Sixth, Ninth and Eleventh Circuits Have Held That The Safety Exemption Does Not Apply To Local Tow-Truck Regulations .. 7

B. The Second Circuit And Several State Courts Have Upheld Similar Regulations 10

II. The Question Presented Is Recurring In Nature And Significant To Municipalities Throughout The Country 14

III. The Sixth Circuit Erred In Concluding That The City of Columbus Could Not Regulate This Activity 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Ace Auto Body & Towing, Ltd. v. City of New York, 71 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999) ..... *passim*
AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 582 (N.D. Tex. 1998) ... 20
Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218 (1993) 7
Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston, 184 F.3d 88 (1st Cir. 1999) 20
California v. ARC Am. Corp., 490 U.S. 93 (1989) 22
Cincinnati v. Reed, 27 Ohio App. 3d 115, 500 N.E.2d 333 (Dist. 1 1985) 5
Michigan Trucking Ass'n v. Michigan Public Service Comm'n, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998) 13
O'Gilve v. United States, 519 U.S. 79 (1996) 22
People ex rel. Renne v. Servantes, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (Cal. App. 1 Dist.) 12
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) ..... *passim*
R. Mayer of Atlanta, Inc. v. City of Atlanta, 153 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999) 5, 6, 9
Russello v. United States, 646 U.S. 16 (1983) 8, 17
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 19

Stucky v. City of San Antonio, No. 00-50462, --- F.3d ---, 2001 WL 863500 (5th Cir. July 30, 2001) .. *passim*
Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001) . 9
Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 11, 18, 19

Constitutional Provisions and Statutes

12 U.S.C. § 1813(c)(1) 19
28 U.S.C. § 1254(1) 1
30 U.S.C. § 1291(22) 19
42 U.S.C. § 8302(a)(21) 19
47 U.S.C. § 253(a) 20
47 U.S.C. § 253(b) 20
49 U.S.C. § 14501(c)(1) ..... *passim*
49 U.S.C. § 14501(c)(2) 8, 18, 22
49 U.S.C. § 14501(c)(4) 21
49 U.S.C. § 60117(i) 19
Ohio Const. Art. 28, § 3 4
Ohio R.C. § 715.22 4
Ohio R.C. § 723.01 4
Ohio R.C. § 4921.02(A)(8) 4
Ohio R.C. § 4923.02(A)(10) 4

Administrative Publications

In re Classic Tel., 11 F.C.C.R. 13082, ¶ 34 (1996) 20

Miscellaneous Authorities

Columbus City Code § 549.02 3
Columbus City Code § 549.065 ..... 3, 4
Columbus City Code § 549.92 3
Columbus City Code § 549.14 3
Columbus City Code § 549.15 3
Columbus City Code § 549.16 3
Columbus City Code § 549.17 3
Columbus City Code § 549.18 3

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506 (6th Cir. 2001), and the district court's opinion (Pet. App. 33-A) is unreported.

JURISDICTION

The court of appeals entered judgment on June 19, 2001. Pet. App. 3-A. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

49 U.S.C. § 14501(c)(1) and (2) of the Interstate Commerce Act ("ICA") provide:

> (1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.—Paragraph (1)—
>
> > (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

STATEMENT

This case squarely presents a recurring federal question that has not been, but should be, resolved by the Court. Over the last several years, five circuit courts, numerous state courts, and several other lower courts have struggled to answer an interpretive question of essential importance to one city after another in the country—namely, whether municipalities may promulgate public-safety regulations regarding the use of tow trucks within their city limits. Enacted in virtually every major city in the country, the regulations typically require local tow-truck operators to obtain a license and to follow modest safety practices when picking up wrecks within the city. Among other things, the regulations are "aimed at eliminating the practice of 'chasing'—where tow trucks race one another to an accident scene in competition for business." *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 768 (2d Cir. 1999).

As acknowledged by several lower courts, including the Sixth Circuit, this question has divided the courts of appeals. And in view of the large number of cities that have adopted equivalent regulations, there can be little doubt about the importance of this federal question to local governments, to say nothing of the acute public-safety issues implicated by

resolution of the issue. For these reasons and those added below, the petition should be granted.

1. Like many other cities in the United States, the City of Columbus has enacted public-safety ordinances designed to protect its residents from the perils of unsafe towing practices. Starting in 1972, the city began addressing the issue of local tow-truck practices by requiring each operator to obtain a license from the city to engage in the towing business. At the same time, it established minimum requirements with regard to liability insurance, truck identification and record keeping with respect to the vehicles that each operator towed. *See* Columbus City Code §§ 549.92, 549.14, 549.15, 549.16, 549.17 and 549.18. Pet. App. 36-A. In accordance with regulations promulgated by the Columbus Director of Public Safety, each licensed tow truck also must undergo a safety inspection on an annual basis. The inspection ensures that the tow trucks are equipped with essential safety items such as flares, fire extinguishers, shovels and brooms, and that the truck itself meets certain minimum requirements for size, towing capacity and lift equipment. *See* City of Columbus Wrecker Rules and Regulation, App. 48-A, and Wrecker Inspection Sheet (enumerating items to be inspected), Pet. App. 54-A. These licensing and other requirements, it bears noting, apply only to tow-truck operators who contract to pick up wrecks within the City of Columbus. *See* Columbus City Code 549.02 ("This section shall not apply . . . when the property being towed has been picked up outside of the City").

2. In addition to these basic regulations, Columbus provides that towing operators may not respond to the scene of an accident unless "summoned by a person having a direct interest in the vehicle . . . or dispatched thereto as provided in the rules and regulations promulgated by the [City] Safety

Director." Columbus City Code § 549.065, Pet. App. 40-A. This provision, like those in many other cities, is designed to root out "chasing," an increasingly prevalent practice by which tow-truck operators race one another to the scene of an accident in the hopes of elbowing out competitors for the business. *See Stucky v. City of San Antonio*, No. 00-50462, — F.3d —, 2001 WL 863500, at *1 (5th Cir. July 30, 2001) (ordinance designed to eliminate "the acknowledged practice of tow truck operators monitoring police radios for reports of accidents and then racing to the scene of those accidents . . . [which] interfered with accident investigations and the provision of emergency care required at the scene").

3. The Columbus tow-truck experience parallels that of other cities in an additional respect. Like many other municipalities, Columbus is located in a State that delegates broad authority to its cities to pass police-power regulations in general and to regulate local transportation issues (like towing) in particular. Section 3 of Article XVIII of the Ohio Constitution grants municipalities general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." The Ohio General Assembly also has enacted several statutes that expressly empower municipalities to regulate motor vehicles and the transportation of articles upon its highways. For example, Ohio R.C. § 715.22 provides that a municipality may regulate the use of vehicles and may regulate the transportation of articles upon its highways. And Ohio R.C. § 723.01 provides that "municipal corporations shall have special power to regulate the use of the streets." Ohio likewise has specifically exempted tow trucks from the State's regulation of motor carriers, Ohio R.C. §§ 4921.02(A)(8) and 4923.02(A)(10), thus leaving it to municipalities and other local governmental entities to regulate local tow-truck

operations. *See Cincinnati v. Reed*, 27 Ohio App. 3d 115, 120, 500 N.E.2d 333, 339 (1st Dist. Ct. App. 1985) (finding municipal towing regulations authorized by state law).

4. Ours Garage and Wrecker Service, Inc. operates a towing company that provides services in Columbus, Ohio. In September of 1998, its Columbus tow-truck license expired, and the company failed to renew the license. Shortly thereafter, one of the company's drivers was cited for failing to have a towing license.

Rather than renew its license at that point in time, the company filed this declaratory judgment action against the City of Columbus and two city officials in the United States District Court for the Southern District of Ohio on December 3, 1998. The lawsuit received support from the Towing and Recovery Association of Ohio, a trade association of tow truck operators, which became a co-plaintiff in the case. In their complaint, the two claimants alleged that 49 U.S.C. § 14501(c)(1) preempts Columbus City Code Chapter 549 and therefore prohibits the city from regulating local towing operations. The City of Columbus responded that while the general preemption provision preempts state laws and regulations "related to price, route or service of any motor carrier . . . with respect to the transportation of property," that provision is expressly subject to several exceptions, including § 14501(c)(2)(A), which permits "the safety regulatory authority of a State" to address towing issues like those presented here.

The district court, however, disagreed. On March 10, 2000, it granted summary judgment for plaintiffs, finding Columbus' towing ordinance preempted and enjoining the City from continuing to enforce it. In doing so, the court said that the regulations were preempted "for the reasons set forth in a decision issued in a virtually identical" case, citing *R. Mayer of*

Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), and specifically "decline[d] to follow *Ace Auto Body & Towing v. City of New York*, 171 F.3d 765 (2d Cir.)," which had upheld a similar New York City towing ordinance. *See* Pet. App. 34-A.

5. On June 19, 2001, the court of appeals affirmed in a two-paragraph opinion. Relying on *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001), the court held that the ICA preempts all local towing regulations of this sort. Pet. App. 2-A. In *Petrey*, the court of appeals invalidated a similar ordinance promulgated by the City of Toledo, and Columbus conceded that it controlled the outcome of this action. The *Petrey* decision, like the district court opinion here, acknowledged that "[t]here is currently a conflict among the circuits" as to whether § 14501(c)(2)(A) exempts tow-truck "safety regulations by political subdivisions." 246 F.3d at 560; Pet. App. 23-A.

REASONS FOR GRANTING THE WRIT

As the Statement suggests and as the case reporters confirm, the question presented is not new. Five circuit courts have issued thoughtful decisions on the issue, four siding with respondents, one siding with the City of Columbus. And the California Court of Appeals has issued a decision that supports Columbus, but conflicts with the Ninth Circuit on the point at hand and with respect to an overlapping jurisdiction of the country. The sheer number of municipalities that have promulgated regulations like the Columbus ordinance, together with the commendable public-safety objectives of the provisions, confirms the importance of this federal question. And the fact that the Sixth Circuit cast its lot with the incorrect side of this lower-court division also supports the writ. All things considered, the case presents an eminently-suitable vehicle for resolving an issue that the Sixth Circuit

acknowledged has created a "conflict among the circuits," *Petrey*, 246 F.3d at 560, that the Fifth Circuit acknowledged raises a "difficult task of statutory interpretation," *Stucky v. City of San Antonio*, 2001 WL 863500, at * 15, and that affects every major city in the country. The writ should be granted.

I. The Question Presented Has Divided The Lower Courts.

A. The Fifth, Sixth, Ninth and Eleventh Circuits Have Held That The Safety Exemption Does Not Apply To Local Tow-Truck Regulations.

On one side of the ledger, four circuit courts have concluded that the ICA preempts safety regulations like this one. The Sixth Circuit's recent *Petrey* decision typifies this school of thought.

At issue in *Petrey* were two types of licenses that the City of Toledo had made available to tow truck operators. One, the "Class B" license, permitted a tower to conduct private and third-party tows, while the other, the "Class A" license, allowed the holder to conduct non-consensual tows ordered by the Toledo Police Department. The court first ruled that the municipal-proprietor exception, *see Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226-27 (1993), justified the Class A license. *Petrey*, 246 F.3d at 555-59. As the court explained, "these provisions do nothing more than serve the City's narrow proprietary interest in working with those towing companies who will be most able to meet safely and efficiently the Toledo Police Department's towing needs." *Id.* at 559.

The Class B license, however, was a different matter. Here, the court focused on the fact that the general preemption

provision applies to "a State, political subdivision of a State, or political authority of 2 or more States," while the safety exemption applies just to "the safety regulatory authority of a State." 49 U.S.C. 14501(c)(1) & (2). Relying on *Russello v. United States*, 646 U.S. 16, 23 (1983) ("[w]here Congress includes particular language in one section of a statue but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"), the court concluded that the omission of a reference to cities in the safety exemption (section 14501(c)(2)(A)) meant that "while states may regulate the safety of motor carriers, political subdivisions may not," *Petrey*, 246 F.3d at 561.

Petrey found further support for this interpretation in its reading of the legislative history.

> "[T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."

246 F.3d at 563 (quoting H.R. CONF. REP. NO. 103-677, at 87 (1994), *reprinted* in 1994 U.S.C.C.A.N. 1715, 1759). To *Petrey*, this report indicated that "one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations, thus indicating that yet another level of regulation at the local level would be disfavored." *Id.*

The Ninth and Eleventh Circuits have followed a similar path. In *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 153 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999), tow truck companies objected to several ordinances adopted by Atlanta dealing with "consensual tows"—that is, tows "which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 153 F.3d at 541. After finding that the general preemption provision, § 14501(c)(1), applied to the contested tow truck ordinances, *id.* at 545, the court considered whether the safety exemption saved them from preemption. Like the Sixth Circuit, it applied "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." 153 F.3d at 545-46. Because only "a State" appears in § 14501(c)(2)(A), and not "a State or a political subdivision of a State" as in § 14501(c)(2)(C), the court concluded that this illustrated "Congress' intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1)." *Mayer*, 153 F.3d at 545-46. The court also found that "this interpretation" was "consistent with the policy objectives underlying the ICCTA." *Id.* at 546 (citing H.R. CONF. REP. NO. 103-677, at 87 (1994), *reprinted* in 1994 U.S.C.C.A.N. 1715, 1759).

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001), too, concluded that a city ordinance, which required permits to operate a tow truck in the city, was preempted by § 14501(c)(1). Here again the court relied on the safety exemption's (but not the preemption provision's) sole reference to "the safety regulatory authority of a State," as well as on its view that "a strict

reading furthers the policy of deregulation underlying the enactment of section 14501." *Id.* at 1051.

Just one month ago, the Fifth Circuit added its views to this debate. Also at issue in *Stucky v. City of San Antonio*, No. 00-50462, — F.3d —, 2001 WL 863500 (5th Cir. July 30, 2001), were licensing ordinances that among other things were designed to end the practice of tow truck operators who "rac[ed] to the scene" of accidents after hearing about them on police-radio frequencies. *Stucky*, 2001 WL 863500, at *1. In addressing whether the ICA preempted the regulations, the court acknowledged "the closeness of the issue and the soundness of the arguments on either side." *id.* at *12, as well as the different positions taken by other lower courts on this "difficult task of statutory interpretation," *id.* at *15. Ultimately, however, the Fifth Circuit embraced the reasoning of the Sixth, Ninth and Eleventh Circuits in concluding that the absence of a reference to political subdivisions in section 14501(c)(2)(A) showed that the safety exemption did not apply to local ordinances.

B. The Second Circuit And Several State Courts Have Upheld Similar Regulations.

On the other side of the ledger, the Second Circuit and several state courts have upheld safety regulations like the one at issue here. In *Ace Auto Body & Towing, Ltd. v. City of New York*, 71 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999), the court acknowledged that political subdivisions were not specifically mentioned in the safety exemption. But it reasoned that even though "the text of § 14501(c)(2)(A), unlike the other subsections of § 14501, fails to preserve explicitly the regulatory authority of the political subdivision of the state," that is "no reason to construe" the language of § 14501(c)(2)(A) "to prevent the state from delegating *its*

regulatory authority to a municipality." *Ace Auto*, 171 F.3d at 775.

In doing so, *Ace Auto* sought guidance from this Court's previous effort to address a similar issue raised by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). That statute, the Second Circuit noted, expressly permits only "States" to regulate pesticides, but this Court still held that the most "plausible reading of FIFRA's authorization to the States leaves the *allocation* of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Ace Auto*, 171 F.3d at 775-776 (emphasis added) (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991)). As more fully explained in *Mortier*:

> The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" . . . in [its] absolute discretion.'" . . . The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" *because political subdivisions are components of the very entity the statute empowers*.

501 U.S. at 607-08 (emphasis added) (quotations omitted). Just as *Mortier* concluded that FIFRA permitted States to delegate authority to political subdivisions even though they were not explicitly mentioned in the statute, so the Second Circuit reasoned it was appropriate to read the ICA to permit such a delegation here. *Ace Auto*, 171 F.3d at 775-76 (citing *Mortier*, 501 U.S. at 607-09).

The Second Circuit also read the legislative history differently from the other courts of appeals. In its view, there is "no reason to construe this language to prevent the State

from delegating its regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be 'unaffected' by the preemption statute." *Ace Auto*, 171 F.3d at 775 (quoting H.R. CONF. REP. NO. 103-677, at 84-85, reprinted in 1994 U.S.C.C.A.N. at 1756, 1757). Accordingly:

> [A]lthough the legislative history clearly illustrates Congress' deregulatory purpose, the history is ambiguous as to the scope of that purpose. More particularly, the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation. To the extent that the scope of Congress' purpose is unclear, we hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability of municipalities to respond to the local safety concerns created by local towing industries.

Ace Auto, 171 F.3d at 775 (citing H.R. CONF. REP. NO. 103-677, at 86-87 (1994), reprinted in 1994 U.S.C.C.A.N. at 1758-59) (internal citation omitted).

Like the Second Circuit, the California Court of Appeals has held that towing ordinances of this type are not preempted by the ICA. "Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress." *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001). Notably, the California Supreme Court denied discretionary review of *Servantes*, and in view of the Ninth Circuit's decision in *Tocher* no reasonable prospect exists that the State's highest court *ever* will look at

the issue. The Michigan Court of Appeals reached a similar result in *Michigan Trucking Ass'n v. Michigan Public Service Comm'n*, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998). There, the issue was not whether a State could delegate its safety authority to a city but rather whether it could do so to a state agency — more specifically, whether the State could delegate authority to the Michigan Public Service Commission to develop and implement a "motor carrier safety rating system." *Id.* at 735. The appellate court expressly held that the agency's safety regulations were not preempted because the rules were "promulgated by the PSC pursuant to its authority from the Legislature" and thus fell within the ICA's safety exemption. *Id.* at 737.

In the final analysis, the division of lower-court authority is mature and deep. Four circuit courts have concluded that the ICA preempts towing regulations like the Columbus ordinance. And one circuit court and two state courts have concluded that these and similar safety ordinances may remain in effect. In the wake of these holdings, the only feature of a local towing ordinance that would affect its validity turns on the jurisdiction in which it was passed, not on what the ordinance said. Add to this the fact that the Sixth and Ninth Circuits on the one hand and the California and Michigan state courts on the other have reached different conclusions about the same issue and with respect to the same jurisdiction, and it becomes clear that this division authority by itself justifies the writ.

II. The Question Presented Is Recurring In Nature And Significant To Municipalities Throughout The Country.

Besides raising a question that implicates a developed split in authority, the petition addresses a matter of ongoing and essential importance to cities throughout the country. As an initial matter, the sheer number of cases on the issue confirms the proliferation of local ordinances that municipalities in every region of the country have promulgated in order to address tow-truck safety in general and accident "chasing" in particular. In addition to *Ace Auto*, *Stucky*, *Petry*, *Tocher*, *Mayer*, *Servantes*, and *Michigan Trucking Association*, these cases include the following: *Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F. Supp. 2d 801 (S.D. Tex. 2000); *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000); *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville*, 78 F. Supp. 2d 725 (E.D.Tenn. 1999); *A.J.'s Wrecker Service, Inc. v. City of Dallas*, Nos. 97-1311D, 97-2398D, 1998 WL 185521 (N.D. Tex. April 15, 1998); *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711 (S.D. Tex. 1996); *Whitten v. Vehicle Removal Corp.*, No. 05-00-00531-CV, 2001 WL 898535 (Tex. App. Aug. 10, 2001); *Horn v. A.J.'s Wrecker Service, Inc.*, No. 05-99-01402-CV, 2000 WL 1184597 (Tex. App. Aug 22, 2000).

Aside from the ordinances involved in these cases, countless other cities and counties have promulgated similar regulations. *See, e.g.*, CINCINNATI MUNICIPAL CODE § 869-7; LOS ANGELES COUNTY, CAL., CODE § 7.28.020; SACRAMENTO, CAL., CODE §§ 5.144.010–5.144.090; SAN FRANCISCO, CAL., POLICE CODE §§ 3000-3013; CHICAGO, ILL., MUN. CODE §§ 9-44-010–9-44-060; ST. LOUIS COUNTY, MO., REVENUE ORD. §§ 813.070–813.080; MYRTLE BEACH CITY

CODE § 23-133; PORTLAND, OR., CODE § 14.36.040; PHILADELPHIA, PA., CITY CODE § 9-605; SEATTLE, WASH., MUN. CODE §§ 6.214.040–6.214.070. The number of cases on the issue, together with the conspicuous number of ordinances that have been passed on this topic, confirm that this public-safety issue should be resolved sooner rather than later.

In addition to the customary requests for uniformity that a deep conflict in the lower courts prompts, the issue here has led to uncertainty even for residents of the same State. The Ninth Circuit and the California state courts for example have charted different paths in answering this specific question. The same is true of the Sixth Circuit and the Michigan state courts. Because no one litigant and the residents of no one State should have to face such unpredictable consequences stemming from the same governmental conduct, this factor alone supports the writ.

Nor is the authority of States to delegate responsibility over this issue inconsequential. All States to our knowledge delegate considerable police-power authority to cities, counties, and municipal associations, including responsibility over public-safety issues on local streets and roads. Yet the consequence of the Sixth Circuit's decision is to force Ohio to enact any such regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets. As a matter of Federal-State comity and as this Court's decision in *Mortier* attests, federal courts should not lightly infer a national desire to upset this traditional allocation of State power. The significance of this issue plus the numerous ordinances premised on this traditional understanding of State authority independently support the writ.

III. The Sixth Circuit Erred In Concluding That The City of Columbus Could Not Regulate This Activity.

In holding that the City of Columbus may not regulate private towing activities in the same way that the City of New York may, the Sixth Circuit also erred. This, too, justifies review.

In 1994, Congress enacted the following provisions:

> (1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.—Paragraph (1)—
>
> > (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

49 U.S.C. § 14501(c)(1) & (2).

In concluding that States but not cities may enact towing safety regulations, the Sixth Circuit (like several of its sister circuits) principally focused on the textual distinction between the governmental bodies mentioned in the one but not the other provision. In its view the contrast between the specific

mention of "political subdivision[s]" in subsection (c)(1) and its absence in subsection (c)(2)(A) could only be given content by reading the exemption as applying solely to "State"-enacted safety regulations. *Petrey*, 246 F.3d at 561; *see id.* ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 646 U.S. 16, 23 (1983)).

Columbus of course does not quarrel with the *Russello* principle, and appreciates the surface appeal of the Sixth Circuit's application of it here. But in the end, the court of appeals was only half correct in applying this interpretive rule and fully wrong in denying Columbus authority to pass this sensible regulation.

First, in focusing on the different references to political bodies in the two subsections, the court slighted other more illuminating distinctions between the provisions. The preemption provision says that "a State, political subdivision of a State, or political authority of 2 or more States may not *enact or enforce* a law, regulation, or other provision" relating to a price, route or service of any motor carrier. 49 U.S.C. 14501(c)(1) (emphasis added). The scope of preemption is broad, to be sure. But so is the safety exemption that directly follows it. Instead of referring to the authority to "enact or enforce" safety regulations, it expansively says that the preemptive force of the ICA "shall not restrict the *safety regulatory authority of a State* with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (emphasis added).

Far from signaling that cities could never pass such safety ordinances, the language of the safety exemption signifies something else. The "safety regulatory authority of a State," it turns out, is a term of art that encompasses an entity's own

authority to regulate, as well as its authority to delegate regulatory power to a lesser governmental body (say to a "political subdivision of a State") or to aggregate its regulatory power with another political body of equal stature (say with "2 or more States"). Congress thus left "political subdivision[s]" (as well as the power of "2 or more States") out of subsection 14501(c)(2)(A) not because it meant to deny them authority but because it was more appropriate, as a matter of Federal-State comity, to allow each State to make that decision for itself.

Nor is it inconsistent to enumerate the political entities that are preempted from enacting a certain law, then to vest regulatory authority in each State to decide which political entities (cities, counties, or other political authorities) may benefit from an exemption to the rule. It will often be the case that a general ban enumerates those covered by it, while delegating to another authority the power to establish and implement exceptions to the ban. For example, the Secretary of the Army may enact a general rule banning all on-duty card playing by generals, lieutenants, captains and other members of the armed services. But the Secretary does not undercut that rule by empowering generals to decide what is "off duty" and what it not or even to delegate that decision to others. As every soldier knows (and as every law firm associate learns), allocations of power in a hierarchical system are not necessarily symmetric.

Second, this reading not only makes sense out of the different references to political bodies in the two provisions, but it also respects another indicator of statutory meaning—Congress' prior understanding of the term "State regulatory authority." Keep in mind that the 1994 passage of this law came just three years after *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). That decision

concerned a federal law providing that a "State *may regulate* the sale or use of any federally registered pesticide." *Id.* at 606 (emphasis added). In construing the statute, the Court concluded that the law's express grant of "*regulatory authority to the States*" did not deprive municipalities of regulatory authority but meant only that "localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been preempted through actual conflicts with federal law." *Id.* at 607 (emphasis added). The Court explained that the most plausible reading of a grant of regulatory authority to the State is that it "leaves the allocation of regulatory authority to the 'absolute discretion' of States themselves, *including the option of leaving local regulation of pesticides in the hands of local authorities.*" *Id.* at 608 (emphasis added). Against this backdrop, Congress's reference to "the safety regulatory of a State" in the ICA is most sensibly read to include the power to delegate its authority to local government entities. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978) (where "Congress . . . employed terminology that evokes a tradition of meaning, . . . [i]t may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition").

Both before *Mortier* and after it, other parts of the United States Code have reflected this understanding. When Congress refers to a "regulatory authority," it thus means to include the State agency or political subdivision delegated State power, not just the State itself. *See, e.g.*, 12 U.S.C. § 1813(c)(1) (Banking); 30 U.S.C. § 1291(22) (Mining); 42 U.S.C. § 8302(a)(21) (Power plant usage); 49 U.S.C. § 60117(i) (Pipelines). Indeed, after the 1994 passage of the ICA provisions at issue in this case, Congress used similar terminology in the Telecommunications Act of 1996. Like the ICA, the preemption provision of that Act says that "No State

or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). And like the ICA, the exemption provision of the Act, entitled "*State regulatory authority*," preserves the authority "of a *State* to impose . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare." 47 U.S.C. § 253(b) (emphasis added). Several courts have made clear that the passage of the law against the backdrop of *Mortier* indicates that States may delegate their retained authority to local political bodies. *See, e.g., Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 582, 591 (N.D. Tex. 1998). Not surprisingly, the FCC itself has also embraced this interpretation. *In re Classic Tel.*, 11 F.C.C.R. 13082, ¶ 34 (1996).

Third, this interpretation of the ICA is the only one that makes sense. Subsection 14501(c)(1), recall, specifies that State political subdivisions may not "enact or *enforce*" any towing laws. (Emphasis added.) As a result, if subsection 14501(c)(2)(A) were construed to reinstate only the *State*'s authority to enact and enforce safety laws (and to preempt any delegation of that authority), state safety laws could never be enforced by cities. That would mean only state troopers, and not city police officers for example, could make arrests or issue fines for a violation of state towing laws. This would come as a great surprise to the States, as most law-enforcement authority (including authority to enforce state laws) is exercised by county and city police officials. In the end, this interpretation would lead to the practical unenforceability of the very safety regulations that the ICA meant to exempt from federal preemption.

The Sixth Circuit's interpretation yields another anomaly. If the specific reference to a "political subdivision of a State" subsection (c)(1) means that such bodies cannot pass towing safety regulations under subsection (c)(2)(A), then it also must mean that the reference to the "political authority of 2 or more States" in the preemption provision (and its absence in the exemption) means that States cannot aggregate their power to create a regional safety rule for their streets and byways. That interpretation cannot be squared with what many of the circuit courts have said is the animating purpose of the ICA—to limit, not expand, the overall number of motor carrier regulations. For like reason, the dual references in the ICA to a specific exemption for the State of Hawaii, *see* 49 U.S.C. § 14501(b)(2) (preserving "the authority of the State of Hawaii" to regulate motor carriers), 49 U.S.C. § 14501(c)(4) (providing that subsection 14501(c) "shall not apply with respect to the State of Hawaii"), would oddly apply only to State laws enacted in Hawaii, but not to city regulations promulgated there.

Fourth, contrary to several of the courts of appeals' decisions, the addition of subsection § 14501(c)(2)(C) does not alter this analysis. In 1995, Congress added a provision to subsection (c)(2) specifying that the preemption provision "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck" if the towing is provided "without the prior consent" of the owner." 49 U.S.C. § 14501(c)(2)(C); Interstate Commerce Commission Termination Act (*see* Pub.L. 104-88, 109 Stat. 803 (1995)). In contrast to subsection (c)(2)(A), which carves out a broad exception for laws necessary to public "safety," subsection (c)(2)(C) creates a narrow exception for the prices of non-consensual towing. That subsection (c)(2)(C) tracks the

political bodies described in the preemption section ("State or a political subdivision of a State"), tracks one of the preempted subjects in that section ("price[s]") and tracks the lawmaking activity that is covered in that section ("to enact or enforce a law") highlights that Congress meant to do something different in the safety exemption, *see* 49 U.S.C. § 14501(c)(2)(A), which does none of these things. Thus, while "the view of a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilve v. United States*, 519 U.S. 79, 89 (1996), the addition of the price exemption for non-consensual towing in 1995 does not support the Sixth Circuit's decision. It merely confirms the conspicuous (and presumably purposeful) distinction between the broad "safety regulatory authority of a State" left intact by the ICA and the other provisions of the legislation.

In addition, as the Second Circuit in *Ace Auto* recognized, 171 F.3d at 775, this case ultimately turns on whether the language of 49 U.S.C. § 14501(c)(1) and (2) establishes that Congress meant to *prohibit* any and all *delegations* of safety regulatory authority by a State to its political subdivisions. As to that issue, this Court has stated that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Whatever else may be said in support of the Sixth Circuit's decision, it cannot tenably be maintained that these provisions of the ICA establish any such "clear and manifest purpose of Congress."

Finally, the legislative history of the ICA does not support the Sixth Circuit's decision. The history is utterly silent with

respect to a State's power to delegate its "safety regulatory authority" and demonstrates, at best, only Congress' general "deregulatory purpose." As even the Fifth Circuit has observed, "the history is ambiguous as to the scope of that purpose." *Stucky*, 2001 WL 863500, at *17. In light of this silence and ambiguity, the legislative history cannot be said to evidence any "clear and manifest purpose of Congress" to preempt a State's delegation of safety regulations.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street
Suite 200
Columbus, Ohio 43215

JEFFREY S. SUTTON
Counsel of Record
TRACI L. JONES
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

September 2001

APPENDIX

United States Court of Appeals,
Sixth Circuit.

OUR GARAGE AND WRECKER SERVICE*; Towing & Recovery Association of Ohio, Plaintiffs-Appellees,

v.

CITY OF COLUMBUS; David Wilson; Bobbie Beavers, Defendants-Appellants.

No. 00-3409.

Submitted June 7, 2001.

Decided and Filed June 19, 2001.

Affirmed.

Susan E. Ashbrook (briefed), Columbus City Atty's. Office, Columbus, OH, for Defendants-Appellants.

James G. Burkhardt (briefed), Office of the City of Toledo, Law Dept., Toledo, OH, for Amicus Curiae.

Before KEITH, BATCHELDER, and MOORE, Circuit Judges.

OPINION

BATCHELDER, Circuit Judge.

Plaintiffs Appellees Ours Garage and Wrecker Service, Inc. ("Ours"), an Ohio corporation operating a towing business in

---

* Although the caption of the case has identified the plaintiff as "Our Garage" throughout the course of this litigation, the company's name in fact is "Ours Garage." We will refer to the company as "Ours Garage."

the City of Columbus, and the Towing and Recovery Association of Ohio ("TRAO"), a trade association of tow truck operators, brought suit against the City of Columbus (the "City") and certain of its officials to enjoin enforcement of Chapter 549 of the Columbus City Code (the "towing ordinance"), which regulates consensual towing operations. Specifically, Ours and TRAO alleged that the Interstate Commerce Act ("ICA"), 49 U.S.C. § 14501(c)(1), preempts the towing ordinance, which among other things requires the owners and operators of tow trucks to obtain a license from the City, maintain insurance, and comply with other regulatory requirements. *See generally* City of Columbus, Ohio, Code ch. 549 (1991). On cross-motions for summary judgment, the district court ruled in favor of Ours and TRAO and permanently enjoined the City from enforcing the towing ordinance. This appeal followed.

In *Petrey v. City of Toledo*, 246 F.3d 548, 555, 558-59, 564 (6th Cir.2001), we held that the ICA does not preempt municipal licensing and safety regulation of non-consensual towing operations when a municipality acts as a market participant, but does preempt other regulation not falling within this narrow exception. On appeal, the City concedes that *Petrey* controls the disposition of this case. Accordingly, we affirm the judgment of the district court permanently enjoining the City's enforcement of these towing provisions.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 00-3409

FILED
JUN 19 2001
LEONARD GREEN, Clerk

OURS GARAGE AND WRECKER SERVICE;
TOWING & RECOVERY ASSOCIATION OF OHIO,
Plaintiffs - Appellees,

v.

CITY OF COLUMBUS; DAVID WILSON; BOBBIE BEAVERS,
Defendants - Appellants.

Before: KEITH, BATCHELDER, and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United State District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court permanently enjoining the City's enforcement of the towing provisions is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk
United States Court of Appeals,
Sixth Circuit.

Anna S. PETREY, d/b/a Magnum Towing,
Plaintiff-Appellee,

v.

CITY OF TOLEDO, Defendant-Appellant.

No. 99-4441.

Argued Nov. 29, 2000.
Decided and Filed April 2, 2001.

*550 John D. Latchney (argued and briefed), Reminger & Reminger, Cleveland, OH, for Appellee.

James G. Burkhardt (argued and briefed), Office of the City of Toledo Law Department, Toledo, OH, for Appellant.

Before DAUGHTREY and MOORE, Circuit Judges; CLELAND, District Judge.*

OPINION

MOORE, Circuit Judge.

Defendant, City of Toledo ("City" or "Toledo"), appeals the district court's order granting plaintiff-appellee Anna Petrey's motion for summary judgment with respect to her claim that various Toledo towing ordinances must be struck down under the preemption doctrine because they conflict with a federal statute, 49 U.S.C. § 14501(c). Toledo also appeals the district court's decision granting summary judgment to on her claim that Toledo's violation of 49 U.S.C. § 14501(c) constituted a

---

* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

denial of her federal rights for which relief is available pursuant to 42 U.S.C. § 1983.

We AFFIRM in part and REVERSE in part the district court's decision in this case.

I. BACKGROUND

On April 3, 1998, Anna Petrey filed suit against the City of Toledo challenging the legality of the City's municipal towing provisions. *See* Toledo, Ohio, Mun. Code ch. 765 (1998). Petrey contends that a series of Toledo's towing ordinances are preempted by 49 U.S.C. § 14501(c), a federal statute which provides, with some important exceptions to be discussed later, that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... *551 with respect to the transportation of property."

Chapter 765 of the Toledo Municipal Code requires, with limited exceptions, that anyone operating a tow truck within the City obtain a towing license from the City's Director of Finance. Toledo Mun. Code § 765.02(a)-(b) (1998).[1] Two types of licenses are available to tow truck drivers: Class A and Class B. *Id.* § 765.02(a)(1), (2). A Class B license permits a tower to conduct private and third-party tows. *Id.* § 765.02(a)(2). A Class A license, however, in addition to private and third-party tows, permits the holder to conduct non-consensual tows ordered by the Toledo Police Department. *Id.* § 765.02(a)(1).

---

[1] The City of Toledo amended Chapter 765 of its Code shortly before this lawsuit was filed. Under the modified provisions, the Class A and Class B "licenses" are now called "safety permits." Toledo Mun. Code § 765.02(a)(1)-(2) (1998). This modification does not affect our analysis. For semantical consistency with the parties and the district court, we will continue to refer to the permits as "licenses." All of the ordinances cited, unless otherwise noted, are current.

While both Class A and Class B applicants must meet certain requirements to be issued a license, the requirements for a Class A license are more onerous and expensive. To obtain a Class B license, an applicant must: 1) pay a filing fee, *id.* § 765.06(a)(1); 2) furnish a certificate of insurance evidencing that the tower is insured up to at least the City's prescribed minimum coverage, *id.* § 765.06(a)(2); 3) fill out an application listing general information about the business and its owners or partners, including any criminal record each owner or partner might have, *id.* § 765.06(a)(3)-(4); and 4) maintain a storage facility within City limits if the tower is to perform third-party tows in the City. *Id.* § 765.05(e)(4).

To obtain a Class A license, however, the applicant must: 1) pay a filing fee that is approximately four times as expensive as the Class B fee, *id.* § 765.03(a)(1); 2) maintain significantly more insurance coverage, *id.*765.03(a)(2); 3) ensure, for police tows only, the availability of at least three approved tow trucks, *id.* § 765.03(b)(4); 4) provide storage space for a minimum of one hundred vehicles, at least twenty-three of which must be at the licensed premises, *id.* § 765.03(b)(5); and 5) maintain a valid special use permit for any licensed premises and auxiliary storage site, *id.* § 765.03(b)(7).[2] If all of the Class A license requirements have been met, then the Director of Public Safety must approve the application.[3]

---

[2] Until the 1998 revisions to Chapter 765, Toledo had imposed additional requirements for Class A applicants, some of which are challenged by Petrey in this lawsuit. These additional obligations included a requirement that all Class A applicants have conducted business in Toledo for at least two years prior to the date of application, as well as a heavy equipment commercial driver's license requirement for all of the applicant's tow drivers. Toledo Mun. Code § 765 03(c)(3), (5) (1997).

[3] This provision represents another change of course for the City of Toledo, for until the 1998 revisions, even though an applicant may have

The City is divided into a number of police towing districts, the amount and boundaries of which are also determined by the City's Director of Public Safety. *Id.* § 765.07(a)-(b). Police towing work in each towing district is rotated among the Class A license holders in that district. *Id.* § 765.07(c). For several years in the ***552** 1990s, the City had granted Class A licenses to the same eleven towing companies for all of the police towing in the city. *See* Rule of the Director of Public Safety No. 10034.[4]

Petrey's towing company, Magnum Towing, first began towing in 1991, and Petrey applied for and was issued a Class B towing license for that year. Petrey failed to renew her license in 1992 and 1993, however, and in 1994, one of Magnum's employees was cited for towing without a license. After renewing her Class B license following the citation, Petrey applied for a Class A license in March 1995. Plaintiff's application was denied both because she had not been legally conducting business in the City during the previous two years as required by Toledo's towing provisions, and because the Director of Public Safety had already limited the number of Class A licensees to eleven. Petrey also applied for a Class A license in both 1996 and 1997, and her applications were similarly rejected. In 1998, Petrey's application was returned to her because she had not provided the City with enough information to grant either a Class A or Class B permit.

---

met all the requirements for a Class A license, this did not guarantee that a license would be awarded. § 765.07(c) (1997). Under the former provision, the Director of Public Safety ultimately determined how many Class A licenses would be granted based on the towing needs of the Police Department. *Id.*

[4] The City asserts that this Rule has since been rescinded. *See* § 765.04(a) (mandating that all Class A applicants who meet the City's requirements shall be granted a Class A license).

On April 3, 1998, Petrey filed suit in the United States District Court for the Northern District of Ohio seeking, on the grounds of preemption, "declaratory and injunctive relief precluding the City from enforcing those portions of Toledo Municipal Code Chapter 765 which deny and have denied Magnum a 'Class A' license and the right to perform non-consensual police tows." Joint Appendix ("J.A.") at 21 (Am. Compl.). More specifically, Petrey challenged the following Toledo towing provisions, all but one of which pertain only to Class A license holders: the storage space requirement, § 765.03(b)(5); the special use permit requirement, § 765.03(b)(6); the requirement that all Class A license holders have been in the towing business in the Toledo area for two years prior to applying for a Class A license, § 765.03(c)(3) (1997); the heavy equipment commercial driver's license requirement, § 765.03(c)(5) (1997); the Rule of the Director of Public Safety limiting the number of Class A licensees to eleven, Rule No. 10034; and the general requirement that all Toledo tow truck drivers obtain a special towing license from the City, § 765.02(c) (1997).[5] J.A. at 238 (Pl.'s Mem. in Supp. of Summ. J.).

Petrey also sought compensatory and punitive damages pursuant to 42 U.S.C. § 1983, alleging that the City, through its application of the towing provisions, had violated her equal protection and substantive due process rights. Petrey further claimed that the City had retaliated against her for exercising her First Amendment rights by selectively applying its towing

---

[5] It is important to note that four of the six provisions specifically challenged by Petrey, including the general tow driver's license requirement in § 765.02(c), are no longer in effect. These provisions will not be at issue when discussing any potential injunctive or declaratory relief. We must still determine whether these provisions are preempted, however, for Petrey also seeks monetary damages pursuant to 42 U.S.C. § 1983 arising out of Toledo's enforcement of these provisions in violation of her alleged federal right not to be regulated.

provisions following her complaints about the Class A license requirements.

On February 16, 1999, the City of Toledo filed a motion for summary judgment as to Petrey's claims. The district court ***553** engaged in a lengthy preemption analysis and ultimately concluded that 49 U.S.C. § 14501(c) permitted states, but not political subdivisions like the City of Toledo, to engage in safety regulation that had been exempted from the statute's general preemption provision. *Petrey v. City of Toledo*, 61 F.Supp.2d 674, 676-80 (N.D.Ohio 1999). The district court further denied, without prejudice to renew, the City's motion for summary judgment as it pertained to Petrey's § 1983 claims. *Id.* at 680. The district court granted, however, the City's motion for summary judgment with respect to Petrey's First Amendment claim. *Id.* Finally, the district court granted leave to Petrey to file a motion for summary judgment by June 30, 1999. *Id.* at 681.

On June 30, 1999, Petrey filed a motion for summary judgment with respect to her claim that Chapter 765 of the Toledo Municipal Code is preempted by 49 U.S.C. § 14501(c). The City responded by renewing its motion for summary judgment with respect to Petrey's § 1983 claims. On October 21, 1999, the district court granted Petrey's motion for summary judgment, stating that the Toledo towing ordinances were preempted and ordering that the City be permanently enjoined from enforcing the provisions specifically challenged in Petrey's motion for summary judgment. The district court denied the City's motion for summary judgment with respect to Petrey's § 1983 claims, and, in light of its finding that Toledo's towing regulations were preempted by federal law, held that there was no genuine issue of material fact that Petrey was deprived of her federal right not to be regulated. Thus, the court held that the only issues left to be decided were the amount of damages, if any, that Petrey had suffered as a consequence of the City's regulations, and whether Petrey was

entitled to recover attorneys' fees, expenses, and costs under 42 U.S.C. § 1988. The district court further held that, pursuant to Fed.R.Civ.P. 54(b), there "was no just reason for delay of the City's appeal" of the permanent injunction prohibiting Toledo from enforcing its towing provisions. J.A. at 356 (D.Ct.Order, Dec. 16, 1999). The City's appeal to this court followed. Pending appeal to this court, the district court, noting that the City had granted Petrey a Class A license for the course of the litigation, ordered a stay of its previous order enjoining the City from enforcing certain sections of its towing regulations.

II. ANALYSIS

A. Standard of Review

This court reviews *de novo* a district court's decision to grant summary judgment. *Thomas v. United States*, 213 F.3d 927, 929 (6th Cir.2000). The moving party has the burden of establishing that there are no genuine issues of material fact, and that it is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). In reviewing the district court's decision to grant summary judgment, this court must view all the evidence in the light most favorable to the nonmoving party. *Thomas*, 213 F.3d at 929. Whether Toledo's towing provisions are preempted by 49 U.S.C. § 14501(c) is a question of law that this court reviews *de novo*. *King v. Ford Motor Co.*,209 F.3d 886, 891 (6th Cir.2000).

B. Preemption

The foundation of the preemption doctrine is the Supremacy Clause of the United States Constitution, which states that "the Laws of the United States ... shall be the supreme Law of the Land[,] ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. When ***554** applying the Supremacy Clause, courts are to "assum[e] that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*,

518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). We now turn to the text of the preemption provision and to the arguments that the parties have made.

1. 49 U.S.C. § 14501(c)'s Text and Legislative History

The general preemption provision of § 14501(c) was first passed in 1994 as part of the Federal Aviation Administration Authorization Act, which attempted, in part, to deregulate the motor carrier industry. *See* Pub. L. No. 103- 305, 108 Stat. 1569, 1606-07; *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 541, 546 (11th Cir.1998). The general preemption rule, recodified in its current form under the Interstate Commerce Commission Termination Act ("ICCTA") of 1995, effective January 1, 1996, provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property." Pub. L. No. 104-88, 109 Stat. 803, 899 (codified at 49 U.S.C. § 14501(c)(1)).

There are two relevant exceptions to § 14501(c)(1)'s general preemption rule in this case. The first, passed in 1994 at the same time the general preemption provision was first enacted, allows the "State" to engage in various safety regulations without falling prey to the general preemption provision. *See* 49 U.S.C. § 14501(c)(2)(A).[6] The second exception to the general rule, added later pursuant to the ICCTA, permits a "State or a political subdivision of a State to enact or enforce

---

[6] More specifically, § 14501(c)(2)(A) states that the general preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self- insurance authorization[.]"

a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. § 14501(c)(2)(C). Because § 14501(c)(2)(C) specifically exempts from preemption a state or political subdivision's regulation of the price of non- consensual tows, it is clear that Congress, when referring to "motor carriers" in the general preemption provision, had tow trucks in mind. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 690-91 (5th Cir.1999); *Mayer*, 158 F.3d at 543.

Rather than argue that Congress did not intend § 14501(c)(1) to apply to towing regulations,[7] the City of Toledo has pursued two alternate avenues by which it contends that § 14501(c)(1) cannot operate to preempt its towing ordinances. First, Toledo contends that the provisions challenged ***555** by Petrey all fall within § 14501(c)(2)(A), the exception to preemption allowing states to regulate the towing industry with respect to various safety concerns. For reasons that will be discussed in detail later, we find this argument unpersuasive. Toledo's second contention, however, has more merit. Rather than attempting to fit all of Toledo's towing provisions, concerning both consensual and non-consensual tows, into a statutory exception to § 14501(c)(1), Toledo argues in the alternative that its provisions setting the standards for towers who may conduct non-consensual, police-ordered tows on behalf of the City do not constitute laws, regulations, or provisions having the force and effect of law under § 14501(c)(1). Rather, the City contends that these provisions reflect nothing more than Toledo's desire, like any private market participant, to conduct

[7] All four circuits that have addressed the issue have held that § 14501(c)(1) does apply to state and local laws regulating towing services. *See Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048 (9th Cir.2000); *Cardinal Towing*, 180 F.3d at 691; *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 774 (2d Cir.1999); *Mayer*, 158 F.3d at 543.

its business with those towing companies that can provide the requisite facilities, experience, equipment, and service to satisfy fully the City's towing needs. In short, Toledo argues that even if its Class B license provisions, which deal with private tows, are preempted by § 14501(c)(1), its Class A license requirements fall under the municipal-proprietor exception to the preemption doctrine.[8] The Fifth and Ninth Circuit Courts of Appeals have recently upheld various municipal towing provisions under the municipal-proprietor exception to preemption, and we join those courts today in holding that Toledo, when acting as a market participant, may set certain standards and ultimately choose those towers which are best able to perform non-consensual police tows for it, without being subject to § 14501(c)'s preemption provisions.

2. Municipal Proprietor Exception to Preemption

Before delving into the circuit court cases recognizing the municipal- proprietor exception in the context of § 14501(c), we begin with the Supreme Court case that officially recognized that the municipal-proprietor exception, originally developed in the Court's dormant Commerce Clause jurisprudence, also applies to preemption cases. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226-27, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993). In *Associated Builders*, ***556** the Massachusetts Water Resources Authority ("MWRA"), an independent government agency given various water supply and treatment responsibilities by the Massachusetts Legislature, was issued a court order to clean

[8] The only Toledo towing provision not part of the Class A licensing requirements that Petrey has challenged is the requirement that all towers obtain a special City towing license before they can conduct tows within City limits. *See* Toledo Mun. Code § 765.02(c) (1997). The preemption analysis for this provision will be addressed separately from the challenged Class A license requirements.

up the Boston Harbor following a lawsuit arising out of the MWRA's failure to keep the Harbor clean. *Id.* at 220-21, 113 S.Ct. 1190. The court order required the clean-up project to proceed without interruption and made no allowance for delays arising out of labor disputes. *Id.* at 221, 113 S.Ct. 1190. Thus, the MWRA and Kaiser, MWRA's project manager for the cleanup, devised a labor agreement that attempted to assure labor stability over the course of the project. *Id.* at 221-22, 113 S.Ct. 1190. The agreement required the use of specific methods to resolve any labor disputes, and "that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment[.]" *Id.* All contractors and subcontractors were required to comply with the labor agreement if they wished to work on the cleanup project. *Id.* at 222, 113 S.Ct. 1190.[9]

A company awarded a contract from MWRA sought to enjoin enforcement of the labor agreement, claiming that the labor agreement was preempted by the National Labor

---

[9] "The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace[.]" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (quotation and internal citations omitted). The Supreme Court's dormant Commerce Clause jurisprudence has consistently articulated the distinction between the State acting as a market regulator and the State acting as a market participant, explaining that "where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). The Court noted that the market participant, or municipal-proprietor, exception makes sense in the dormant Commerce Clause context "because the evil addressed by those restrictions-the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power ... to favor their own citizens-is entirely absent where the States are buying and selling in the market." *Id.* (citation omitted).

Relations Act ("NLRA"). *Id.* at 223, 113 S.Ct. 1190. The Court disagreed, and in doing so noted the important difference between the State's role as regulator and its role as a market participant. *Id.* at 226- 29, 113 S.Ct. 1190. The Court explained that "pre-emption doctrines apply only to state regulation[,]" and not to a State's actions when it acts in its proprietary capacity. *Id.* at 227, 113 S.Ct. 1190. Upon examining the MWRA's mandatory labor agreement for all contractors, the Court stated that, rather than this being an attempt to regulate the conduct of others, the labor agreement was simply an "attempt[ ] to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232, 113 S.Ct. 1190.

The Court contrasted this scenario to that in *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 283-84, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), in which Wisconsin enacted a statute forbidding its state procurement agents from purchasing any product known to be manufactured by labor law violators. *Associated Builders*, 507 U.S. at 228-29, 113 S.Ct. 1190. In *Gould*, the Court held that this procurement statute was preempted by the NLRA, stating that it could not "even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs [.]" *Gould*, 475 U.S. at 291, 106 S.Ct. 1057. The Court viewed Wisconsin's conduct in enacting and enforcing the procurement statute as an attempt to use the State's spending power to deter violations of the NLRA, rather than as an effort by the State in its proprietary capacity to address a valid economic concern. *Associated Builders*,507 U.S. at 228-29, 113 S.Ct. 1190. As the Fifth Circuit explained, "[f]ollowing the logic of *Gould*, courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power." *Cardinal Towing*, 180 F.3d at 692.

The Fifth Circuit, in *Cardinal Towing*, was the first court of appeals to apply the municipal-proprietor exception to the preemptive language of 49 U.S.C. § 14501(c)(1). In this case, the city of Bedford, Texas repealed a statutory scheme in which local towing companies that applied and met certain requirements were placed into a rotation to do the city police department's towing work. *Cardinal Towing*, 180 F.3d at 688-89. Bedford ***557** replaced this scheme with an ordinance simply stating that the city's non-consensual police tows would be conducted by the company that receives a contract from the city. Under the ordinance, contract applicants had to meet a number of requirements. Applicants had to guarantee a towing response time of no more than fifteen minutes, as well as ensure access to a class-eight wrecker, a large towing vehicle able to remove tractor-trailer trucks. The ordinance did not affect private towing arrangements in any way.

A towing company that applied for, but did not receive, the contract to do the city's police towing challenged the statute in federal court on the grounds that it was preempted by 49 U.S.C. § 14501(c)(1). Following the Supreme Court's holding in *Associated Builders*, the Fifth Circuit decided that Bedford's ordinance authorizing the city to award a contract to the single towing company that best met its requirements was not preempted by 49 U.S.C. § 14501(c). *Id.* at 691-94. The court held that the city's actions were akin to private market participation, in which, rather than trying to promote general societal goals, it was attempting to fulfill a "narrow proprietary interest in its own efficient procurement of services." *Id.* at 693. The court explained that selecting a single company allowed for administrative efficiency and easier monitoring of towing performance, and that the specifications for contract eligibility imposed by the city were all related to efficient and reliable towing. *Id.*

While the towing provision at issue in *Cardinal Towing* dealt exclusively with non-consensual police tows and allowed the

municipality to contract with only one towing company, the Ninth Circuit recently addressed a challenge to a broader towing scheme in Santa Ana, California, similar to Toledo's. *Tocher*, 219 F.3d at 1043. Santa Ana had enacted a number of towing provisions, many of which applied to all towers regardless of whether they performed towing work for the City. The general provisions created a permit requirement for both towing companies and tow truck drivers, and mandated that all towers maintain storage facilities, keep certain business hours, and publicly display towing rates. Another challenged provision, however, concerned only tows performed for the City police department. This provision authorized the chief of police to establish a towing rotation for non- consensual police tows, to establish the standards for placement in the rotation, and to limit that rotation to the number of towers she deemed necessary.

The Ninth Circuit held that all of Santa Ana's generally applicable towing provisions were preempted by § 14501(c)(1), as they all related to prices, routes, or services of the towing industry, and because none of the statutory exceptions to preemption applied. *Id.* at 1047-48, 1050-52. The court refused to preempt, however, the towing rotation for police-ordered tows, calling it a "classic example of a municipality acting as a market participant [,]" and noting that the provision "merely establish[es] rules and regulations to guide the formation of contracts for towing services provided exclusively to the City." *Id.* at 1049. The court further explained that while the provision at issue in the Fifth Circuit's decision in *Cardinal Towing* involved a contract for towing services with only one company, the fact that a city decides to contract with multiple companies for its police towing does not mean that it still cannot act under the municipal-proprietor exception to preemption. *Id.* at 1049-50.

The only difficulty the Ninth Circuit had with Santa Ana's police towing rotation provision was that it allowed only those

*558 towers who had obtained a City towing permit to participate in the rotation, the same generally applicable towing permit requirement that the court had just decided was preempted. *Id.* at 1050. The court held that, while the City could establish the standards and requirements for participation in the police towing rotation, it could not require that those towers obtain this generally applicable permit. Using the Santa Ana Municipal Code's severability provision, the court struck down that part of the rotation provision that required towers to obtain the permit. *Id.*

We join the Fifth and Ninth Circuit Courts of Appeals in holding that the municipal-proprietor exception applies to § 14501(c)(1). *See Tocher*, 219 F.3d at 1050; *Cardinal Towing*, 180 F.3d at 694-96. We agree with these circuits that the express preemption provision at issue in § 14501(c)(1) is strikingly similar to that in 29 U.S.C. § 1144(a), the ERISA preemption statute, and that because courts have consistently recognized the municipal- proprietor exception in the ERISA context, there is no good reason to limit the exception only to ERISA or NLRA cases. *Id.* We further agree that, aside from the statutory language, the municipal-proprietor exception is also consistent with the purpose of § 14501(c), which is to deregulate the motor carrier industry and "encourage market forces." *Cardinal Towing*, 180 F.3d at 695; see also *Tocher*, 219 F.3d at 1050.

We must now ask whether the municipal-proprietor exception saves any of Toledo's challenged towing ordinances from preemption under § 14501(c)(1). All but one of the ordinances challenged by Petrey relate solely to those towers wishing to perform non-consensual tows for the Toledo Police Department. The specific Class A license requirements that Petrey has challenged, along with the Rule of the Director of Public Safety limiting the number of Class A licensees to eleven, only affect the provision of towing services to the City itself. Like the police towing rotation provision in *Tocher*,

these non-consensual police-tow provisions simply reflect the City's attempts to create rules and standards that will lead to the safe and efficient towing and storage of vehicles that would otherwise clog the streets of the City of Toledo.

Section 14501(c)(1) does not prevent Toledo from choosing the towers with which it will do business. If Toledo did not have the ability to act as any other private market participant and decide who would perform its towing work, then it would arguably be forced to deal with all towers interested in getting work from the City, regardless of the tower's qualifications, equipment, or facilities. If § 14501(c)(1) preempted a City's efforts to set standards for those companies doing its police towing, then Toledo would have no choice but to work with towing companies with unusually slow response times or towers prone to damaging the cars they transport, so long as those towers wanted to work for the City. By setting standards for those companies who will be allowed to conduct police-ordered tows, Toledo can ensure that there will be sufficient space for the vehicles it needs to have towed, that any storage facilities to which the cars are towed will be safe, and that the drivers who operate the tow trucks will have the training to tow vehicles safely and efficiently. Furthermore, by limiting the number of participating towers in the Class A program, Toledo can ensure greater administrative efficiency and can better monitor the performance of all the towers involved.

Toledo's towing provisions dealing exclusively with non-consensual, police-ordered tows do not constitute attempts on the *559 part of the City to regulate the towing industry as a whole, or to advance some general societal goal. Instead, these provisions do nothing more than serve the City's narrow proprietary interest in working with those towing companies who will be most able to meet safely and efficiently the Toledo Police Department's towing needs.

For these reasons, we hold that the challenged Toledo towing provisions dealing solely with those towers wishing to perform non-consensual police tows for the City, along with the Rule limiting the number of police towers to eleven, are proprietary in nature, do not constitute regulation or have the force and effect of law, and thus are not preempted by 49 U.S.C. § 14501(c)(1).

3. Does § 14501(c)(1) Preempt Toledo Mun. Code § 765.02(c)?

The only provision Petrey challenges that does not deal exclusively with non-consensual, police-ordered tows is § 765.02(c) (1997), which requires that all tow drivers in the City obtain a special towing license. Because § 765.02(c) requires all tow drivers to obtain a special towing license, even those not doing work for the Toledo Police Department, it clearly does not fall within the narrow exception to preemption for municipal actions driven by a purely proprietary interest. Thus, we will have to determine whether either of the relevant statutory exceptions to preemption apply.

Like several of the other provisions Petrey has challenged, § 765.02(c) has been removed from Toledo's towing provisions since the filing of her lawsuit, and thus will not be at issue for purposes of any potential declaratory or injunctive relief. We must still determine whether this provision is preempted by § 14501(c)(1), however, for Petrey also seeks monetary damages arising out of Toledo's enforcement of the challenged provisions pursuant to 42 U.S.C. § 1983.

As stated earlier, Toledo does not argue that § 14501(c)(1) is inapplicable to its towing provisions. Section 14501(c)(1) prevents states or political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property[,]" and all of the circuits that have addressed this

provision have held that it applies to state and local laws regulating towing services. *See Tocher*, 219 F.3d at 1048; *Cardinal Towing*, 180 F.3d at 691; Ace Auto, 171 F.3d at 774; *Mayer*, 158 F.3d at 543. These courts have further held that ordinances similar to Toledo's do relate to a price, route, or service of the towing industry. *See Tocher*, 219 F.3d at 1047-48; *Cardinal Towing*, 180 F.3d at 691; *Ace Auto*, 171 F.3d at 771; *Mayer*, 158 F.3d at 545. Once it is acknowledged that § 765.02(c) relates to a price, route, or service of the towing industry, the plain language of § 14501(c)(1) preempts it, unless an exception to preemption applies.

a. The Statutory Exceptions to Preemption

Section 14501(c)(1)'s general preemption provision is subject to several exceptions. As mentioned earlier, § 14501(c)(2)(C) exempts from preemption the regulation of "the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." So, while a city or state's regulation of the price of non-consensual police tows is permitted, Toledo's license requirement for all tow drivers doing work in the ***560** City clearly does not fit within this exception.[10].

The only other exception that applies in this case, and the exception upon which Toledo focuses its arguments, is § 14501(c)(2)(A), which states that the general preemption provision in § 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles ... or the authority of a State to regulate motor carriers with

---

[10] Section 14501(c)(2)(C) allows political subdivisions to regulate the price of both private and police-ordered non-consensual tows. This exception does not apply to § 765.02(c)'s general towing license requirement, however, for § 765.02(c) is not a price regulation, nor does § 765.02(c) apply only to non-consensual tows.

regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization[.]" Toledo contends that all of its challenged towing provisions, including § 765.02(c), are statutorily excepted from preemption because they fall within the category of safety regulations. In determining whether Toledo's towing provisions are excepted from preemption under § 14501(c)(2)(A), we must answer two questions: 1) does the statutory language allowing the "State" to regulate the safety of motor vehicles apply to safety regulations by political subdivisions of states?; and 2) if so, do Toledo's towing provisions constitute safety regulations so as to fall under this exception to § 14501(c)(1)'s general preemptory language?

b. Does the Statutory Language of § 14501(c)(2)(A) Apply to Cities?

Section 14501, on numerous occasions, makes reference to the power of both states and "political subdivisions" of those states to enact laws or regulations in various areas of intrastate transportation. The general preemption provision of § 14501(c)(1) states that no "State [or] political subdivision of a State" may enact a law or regulation related to a "price, route, or service of any motor carrier ... with respect to the transportation of property." Section 14501(c)(2)(C), an exception to the general preemption provision, also explicitly exempts both states and political subdivisions of states from § 14501(c)(1) when regulating the price of non- consensual towing. And while the term "political subdivision[s]" is mentioned seven times in 49 U.S.C. § 14501, the term is notably absent from the exception to preemption in § 14501(c)(2)(A). Section 14501(c)(2)(A) states that the general preemption provision in § 14501(c)(1) "shall not restrict the safety regulatory authority of a *State* with respect to motor vehicles ... or the authority of a *State* to regulate motor carriers with regard to minimum amounts of financial

responsibility relating to insurance requirements and self-insurance authorization." (Emphasis added).

There is currently a conflict among the circuits regarding whether the omission of the "political subdivision" language in § 14501(c)(2)(A) reflects Congress's intent that safety regulation by political subdivisions not be exempted from preemption. The Ninth and Eleventh Circuits have held that this exception does not apply to safety regulation by political subdivisions. *Tocher*, 219 F.3d at 1050-51; *Mayer*, 158 F.3d at 545-48. The Second Circuit has come to the opposite conclusion, holding that safety regulation by political subdivisions does fall within the exception to preemption. *Ace Auto*, 171 F.3d at 775-76. After analyzing the statutory language and legislative history of § 14501, as well as Supreme Court and Sixth Circuit precedent, we align with the Ninth and Eleventh Circuits in holding ***561** that safety regulation by political subdivisions is not exempted from the general preemptory language of § 14501(c)(1).

(i) § 14501's Statutory Language

The language of § 14501 provides fairly convincing evidence that the safety regulation exception to preemption was not meant to apply to a state's political subdivisions. As mentioned above, within § 14501, "political subdivision[s]" are mentioned seven times, yet the term is not mentioned at all in § 14501(c)(2)(A). In addition, for purposes of this statute, the term "State" is defined as "the 50 States of the United States and the District of Columbia." 49 U.S.C. § 13102(18). The Supreme Court has held that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quotation omitted); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (same). Because the

term at issue is mentioned so frequently in § 14501, and yet is not mentioned at all in § 14501(c)(2)(A), the use of this presumption seems "particularly appropriate" in this case. Mayer, 158 F.3d at 545. Applying this presumption in this case, we hold that, while states may regulate the safety of motor carriers, political subdivisions may not.

In *Ace Auto*, the Second Circuit relied, in part, on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), in finding that § 14501(c)(2)(A) exempts political subdivisions' safety regulation from preemption. *Ace Auto*, 171 F.3d at 775-76. *Mortier* appears readily distinguishable from this case, however. *Mortier* involved the interpretation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Mortier*, 501 U.S. at 600-02, 111 S.Ct. 2476. This statute dictates that states may regulate the sale or use of pesticides so long as it is not prohibited by FIFRA. FIFRA contains no general preemption provisions from which states are excluded, nor does it explicitly preempt regulation by political subdivisions. *Id.* at 606, 111 S.Ct. 2476. The Supreme Court, "start[ing] with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress[,]" *id.* at 605, 111 S.Ct. 2476, held that the statutory language and the legislative history of FIFRA never overcame that presumption, and that local regulation of pesticides was not preempted under the Act. *Id.* at 605-16, 111 S.Ct. 2476. The Supreme Court recognized that "FIFRA nowhere expressly supersedes local regulation of pesticide use [,]" *id.* at 606, 111 S.Ct. 2476, and further determined that, because states are permitted to regulate pesticides so long as they remain consistent with FIFRA, and because "political subdivisions are components of the very entity the statute empowers[,] ... the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local

regulation of pesticides in the hands of local authorities." *Id.* at 608, 111 S.Ct. 2476.

Unlike FIFRA, 49 U.S.C. § 14501 does contain express preemptory language prohibiting political subdivisions from regulating the towing industry. While we also start with the presumption that a state's police powers are not to be superseded by a federal statute unless it is the clear purpose of Congress, § 14501(c)(1) plainly states Congress's desire to preempt state and local regulation of the towing industry, ***562** with limited exceptions. The Eleventh Circuit's opinion in *Mayer* further highlights the differences between FIFRA and § 14501(c):

> In *Mortier*, the Court faced a claim that the use of the word "State" without mentioning political subdivisions revealed Congress' "clear and manifest purpose" to preempt local regulation. In response, the Court held that Congress' silence concerning political subdivisions is not sufficient to satisfy this rigorous standard. Section 14501(c)(1), on the other hand, expressly preempts all state and local regulation of certain aspects of the motor transportation industry, and the question we must answer is whether Congress' silence in an exception to this rule implies that political subdivisions are to be included within the exception.... [J]ust as the statutory silence in *Mortier* was insufficient to establish preemption in the first place, so the statutory silence here is insufficient to overcome the preemption otherwise expressly mandated by the statute.

Mayer, 158 F.3d at 547 n. 7 (quotation omitted).

Section 14501 and FIFRA also differ in the number of references each statute makes to "political subdivisions." As the *Mayer* court explained, the specific FIFRA provision interpreted in *Mortier* made no reference to political

subdivisions whatsoever, "and FIFRA as a whole contains only scattered mention of political subdivisions in its other parts." *Id.* at 547 (quotation omitted). We contrast FIFRA with § 14501, which contains seven references to political subdivisions overall, a reference to political subdivisions in the general preemption provision, and a reference to political subdivisions in one of the exceptions to the general preemption provision. § 14501(c)(2)(C). The natural conclusion derived from this language is that Congress did not intend to exempt political subdivisions from preemption when they attempt to engage in safety regulation.

Sixth Circuit case law also supports this conclusion. In *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 627-29 (6th Cir.1996), we analyzed whether a municipal ordinance enacted pursuant to state constitutional authority was preempted under the Federal Railway Safety Act ("FRSA"). The FRSA, as Congress intended, "preempt[s] all railroad safety legislation except state law governing an area in which the Secretary of Transportation has not issued a regulation or order and state law more strict than federal regulations when necessary to address local problems." *Id.* at 628. In *Plymouth*, the City, acting pursuant to its authority under the Michigan Constitution, enacted several railroad regulations. *Id.* at 627-28. Plymouth argued that, while the statutory language only explicitly exempted from preemption state regulation of railroad safety, the city should come within this exception to preemption as well, particularly because it was acting pursuant to the Michigan Constitution. *Id.* at 628. We quickly dismissed the City's argument, however, holding that the exceptions to preemption under the FRSA apply only to state laws or regulations, and that because Plymouth is not a state, Plymouth's ordinance cannot come within the exceptions to preemption. *Id.*

The facts in *Plymouth* are quite similar to those in this case. Just as in *Plymouth*, Toledo asks that we include its safety

regulations within § 14501(c)(2)(A)'s exception to preemption. Like the FRSA in *Plymouth*, § 14501(c)(1) expressly preempts municipal regulation of the towing industry, but does not explicitly exempt municipal safety regulation from the general preemption provision. Just as in *Plymouth*, we refuse to include cities within an exception ***563** to preemption, the language of which is conspicuously devoid of any reference to political subdivisions.

Ohio Manufacturers Ass'n v. City of Akron,801 F.2d 824 (6th Cir.1986), *cert. denied*, 484 U.S. 801, 108 S.Ct. 44, 98 L.Ed.2d 9 (1987), also provides support for holding that § 14501(c)(2)(A) does not exempt municipal safety regulation from preemption. In that case we analyzed a rule of the Occupational Safety and Health Agency ("OSHA") that expressly preempted any "state law" pertaining to evaluating and communicating hazards to employees in the manufacturing sector. *Id.* at 827. Plaintiffs in the case argued that since state law was preempted, then necessarily municipal law would be preempted as well. *Id.* at 828. Defendants countered that if OSHA wished to preempt local regulation, it could easily have done so explicitly. *Id.* We held that municipal regulation was not preempted by this rule, stating that "[based on Congress' practice of explicitly preempting political subdivisions and the fact that political subdivisions are referred to in other sections of the OH Act, ... Congress did not simply overlook including political subdivisions[, nor did] it implicitly include[] them in the word 'state.' " *Id.* at 829.

The same rationale applies to the current case. Congress explicitly mentioned political subdivisions numerous times in § 14501, including its explicit preemption of political subdivisions' regulation in § 14501(c)(1). We cannot say that Congress simply made a mistake by failing to include political subdivisions in the exception to preemption in § 14501(c)(2)(A). Instead, Congress's silence in failing to include political subdivisions in § 14501(c)(2)(A) clearly

indicates that municipal safety regulation was not meant to be exempted from preemption.

(ii) Legislative History and Purpose

The legislative purpose and history of § 14501 also support the notion that Congress's failure to include political subdivisions in § 14501(c)(2)(A) was deliberate. Through the ICCTA, Congress intended to promote greater competition in the motor transportation industry. *Mayer*, 158 F.3d at 546. As expressed in the ICCTA's conference report, one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations, thus indicating that yet another level of regulation at the local level would be disfavored:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets.... The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted* in 1994 ISKCON 1715, 1759. As the Eleventh Circuit correctly stated, "it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Mayer*, 158 F.3d at 546.

In light of both the statutory language and legislative history of § 14501, we hold that Toledo does not have the authority to engage in safety regulations under § 14501(c)(2)(A). Because

Toledo may not avoid preemption under this exception, we need not address the issue whether ***564** § 765.02(c), or any of Toledo's other challenged provisions, constitute safety regulations that would fall within § 14501(c)(2)(A)'s exception to preemption.

To summarize, we hold that the towing provisions which Petrey has challenged that relate solely to the performance of non-consensual towing work for the City of Toledo fall within the municipal-proprietor exception to preemption, and thus are not affected by § 14501(c)(1). The City's general license requirement for all City tow drivers, however, is not covered by this narrow exception to preemption, nor do any of the statutory exceptions to § 14501(c)(1) apply. Therefore, § 765.02(c), though no longer a part of the Toledo Municipal Code, is preempted by § 14501(c)(1), and should not have been enforced against Petrey or any other towers within the City. Thus, the district court's decision granting Petrey's motion for summary judgment with respect to her preemption claims is AFFIRMED in part and REVERSED in part.

C. Petrey's 42 U.S.C. § 1983 Claims

In Petrey's amended complaint, she alleged that the City's use of its towing regulations in spite of the federal preemption provision was injurious to her. She sought damages as a result. Both Petrey and the City have treated this claim as one arising under 42 U.S.C. § 1983. The district court, after denying Toledo's motion for summary judgment with respect to Petrey's § 1983 claims, held that, in light of its finding that Toledo's challenged towing regulations violated the express preemption provisions of 49 U.S.C. § 14501(c), there was no genuine issue of material fact that Petrey was deprived of her federal right not to be regulated, and that Toledo's violation of § 14501(c) was "a sufficient basis for plaintiff's 42 U.S.C. § 1983 claims." J.A. at 312 (D.Ct.Order, Oct. 21, 1999). While we have concluded that all but one of Toledo's challenged towing provisions are not preempted by § 14501(c)(1), § 1983 relief

may still be available if we conclude that Toledo's enforcement of § 765.02(c), the challenged provision that we have held to be preempted, violated any federal right Petrey has not be regulated.

Cities can be sued directly under § 1983. *Monell v. Dep't of Soc. Serve.*,436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In the landmark case of *Maine v. Thiboutot*, 448 U.S. 1, 4-8, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the Supreme Court held that § 1983 suits are available when those acting under color of state law violate federal statutes. A two-step inquiry is used to determine whether § 1983 remedies are available for a violation of a federal statute. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). The plaintiff must first assert a violation of a federal right. *Id.* To violate a federal right, the federal provision at issue must create a clear obligation that binds the governmental unit, and not simply state a "congressional preference for certain kinds of treatment." *Id.* (quotation omitted). In addition, the Court requires that the asserted right not be so vague or amorphous such that it is beyond the competency of the judiciary to enforce. The Court also asks whether the provision at issue was intended to benefit the plaintiff. *Id.*

The second step of the inquiry is to ask, even if the plaintiff has asserted a federal right, whether the defendant can "show that Congress specifically foreclosed a remedy under § 1983 by providing a comprehensive enforcement mechanism for protection of a federal right[.]" *Id.* (quotation omitted). The burden of showing that a federal statute's enforcement ***565** scheme precludes § 1983 relief is on the defendant, and the Court does not lightly conclude that Congress did not intend for § 1983 relief to be available to enforce a federal statute. *Id.* at 106-07, 110 S.Ct. 444.

In *Golden State*, the Supreme Court, following its previous decision that Los Angeles's attempts to condition the award of

a taxicab operating license on the cab company's settlement of a labor dispute were preempted by the NLRA, held that § 1983 relief was available for the cab company due to the city's unlawful interference with the collective bargaining process. *Id.* at 108- 13, 110 S.Ct. 444. The Court held that the NLRA did not have any "comprehensive enforcement scheme for preventing state interference with federally protected labor rights[,]" and that there was no question that the Court's previous holding that the city's conduct was preempted was within the competence of the judiciary to enforce. *Id.* at 108-09, 110 S.Ct. 444. The Court further held that the cab company was the intended beneficiary of the NLRA's provisions preempting state and local interference with the collective bargaining process. *Id.* at 109, 110 S.Ct. 444.

Based on the analysis in *Golden State*, it is clear that the first step of the inquiry is met in Petrey's case. Like the cab company in *Golden State*, Petrey's towing company was certainly the intended beneficiary of 49 U.S.C. § 14501(c)(1)'s express prohibition on state and local regulation of the towing industry. Arguably, the preemption provision at issue in this case speaks even more clearly than the NLRA, which does not contain an express preemption provision, that states and municipalities are not to regulate the towing industry, except for certain narrow exceptions. Thus, Petrey had a federal right under the preemption provision, and because Toledo regulated the towing industry in violation of that provision, Petrey was deprived of her federal right in this case.

As for the second step of the inquiry, the district court has convincingly shown that 49 U.S.C. § 14501 does not have a comprehensive enforcement mechanism that would preclude § 1983 relief for those injured due to unlawful state or local regulation of the towing industry. J.A. at 311-12 & n. 3 (D.Ct.Order, Oct. 21, 1999). The district court correctly noted that while the ICCTA, of which § 14501 is a part, does have enforcement provisions, 49 U.S.C. §§ 14701-14709, none of

these provisions allows Petrey to seek any form of relief against states or municipalities for unlawful regulation in violation of § 14501(c).

Because Petrey's federal right under § 14501(c) not to be regulated was violated, and because § 1983 relief was available for the violation of that right, we remand this case to the district court for a determination of the amount of damages, if any, that Petrey has incurred due to the violation of her federal right, as well as whether Petrey is entitled to attorneys' fees, expenses, and costs under 42 U.S.C. § 1988. It is important to note, however, that because the challenged Class A license requirements are not preempted, Toledo, in applying these Class A license provisions, has not violated Petrey's federal right not to be regulated. Thus, no damages can be awarded based on the City's decision to deny Petrey's towing company the opportunity to perform non-consensual tows for the Toledo Police Department.

III. CONCLUSION

For the foregoing reasons, we AFFIRM in part and REVERSE in part the district court's decision granting Petrey's motion for summary judgment on her preemption ***566** claims. We also AFFIRM the district court's decision that Petrey was denied a federal right for which § 1983 relief is available, and REMAND to that court for a determination of the amount of damages, if any, that Petrey has incurred.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
00 MAR 10 PM 4:29
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

Ours Garage & Wrecker Service, et al.,

Plaintiffs,

-v-

Case No. C-2-0310
JUDGE SMITH
Magistrate Judge King

City of Columbus, et al.,

Defendants.

ORDER

This case present the issue whether municipal regulations affecting consensual towing are preempted by provisions of the Interstate Commerce Act ("ICA"), as amended, 42 U.S.C. § 14501(c)(1). The facts are not disputed, and the case presents a purely legal issue. Plaintiffs move for summary judgment and injunctive relief (Doc. 10), and defendants move for summary judgment (Doc. 12).

Section 549.02 of the Columbus City Code provides in pertinent part:

> ...No owner of tow truck shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid truck owner's license obtained

pursuant to this chapter has been issued and is in force for that tow truck.

No tow truck operator shall engage in the towing of any vehicle within the City of Columbus or offer such service to the owner or operator of any vehicle unless a valid tow truck operator's license is obtained pursuant to this chapter has been issued and is in force for that tow truck operation...

The ICA provides in part as follows:

General Rule - Except as provided in paragraph (2) and (3), a State, [or a] political subdivision of a State, ...may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor ...with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The exceptions to the general rule allow "a state" to regulate safety and financial responsibility. 49 U.S.C. § 14501(c)(2)(A). Defendants argue that "a state" includes political subdivisions of a state; plaintiffs argue it does not.

The Court holds as a matter of law that the subject Columbus City Code section is preempted by the ICA for the reasons set forth in a decision issued in a virtually identical cases of *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11 Cir. 1998), *cert. denied*, 119 S. Ct. 1334 (1999) and *Anna Petrey dba Magnum Towing v. City of Toledo*, 61 F. Supp.2d 674, 677-680 (N.D. Ohio 1999). That is, the Court concludes that, as a matter of statutory construction, the exceptions to the general rule stated in 49 U.S.C. § 140501(c)(1) apply only to states, and not municipalities. In reaching this conclusion, the Court declines to follow *Ace Auto Body & Towing v. City of New York*, 171 F.3d 765 (2nd Cir.), *cert. denied*, 120 S. Ct. 166 (1999) because the statutory construction by the court in *Ace* does not comport with that of

the Sixth Circuit Court of Appeals in examining a similar statutory scheme. *See CSX Transportation, Inc. v. City of Plymouth*, 86 F.3d 626, 628 (6th Cir. 1996). But see *New Orleans Towing Ass'n. Inc. v. City of New Orleans*, 2000 WL 19307 (E.D. La. Feb. 15, 2000) (following *Ace*).

The Court grants plaintiff's motion for summary judgment and injunctive relief (Doc. 10), and denies defendants' motion for summary judgment (Doc. 12). Plaintiffs' motion for a preliminary injunction (Doc. 2) is moot.

The Clerk shall enter a final judgment in favor of plaintiffs, and against defendants, permanently enjoining defendants from applying or enforcing Chapter 549 of the Columbus City Code with respect to the plaintiffs named in this action or any members of plaintiff TRAO.

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Chapter 549
TOW TRUCKS

Sections:

549.01 **Definitions.**
549.02 **License required.**
549.03 **License application.**
549.035 **License for partial year.**
549.04 **Issuance of licenses.**
549.05 **Expiration of license.**
549.06 **Assignment or transfer of licenses.**
549.065 **Responding to the scene of an accident.**
549.07 **License denial, suspension or revocation.**
549.08 **Hearing on charges; decision.**
549.09 **Advisory board.**
549.10 **Function of the Board.**
549.11 **Judicial review.**
549.12 **Official acts used as evidence.**
549.13 **Separability clause.**
549.14 **Liability insurance required.**
549.15 **Extent of insurance.**
549.16 **Identification of tow trucks.**
549.17 **Transport sheet required.**
549.18 **Required records.**
549.19 **Notice of conviction (Repealed)**
549.20 **Authority to issue rules and regulations.**
539.99 **Penalties.**

Cross Reference

Impounding vehicles - see TRAF. Ch. 2107

549.01 Definitions.

(a) "Wrecker" or "tow truck" means every motor vehicle which is designed and used to tow or transport any other motor vehicle. For the purpose of this chapter, the terms wrecker and tow truck shall be synonymous.

(b) "Owner" means a person who holds the legal title of a tow truck, or in the event a tow truck is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, then such conditional vendee or lessee shall be deemed the owner for purposes of this chapter.

(c) "Driver" or "operator" means every person who drives or is in actual physical control of a tow truck on a public street or public right of way within the City of Columbus.

(d) "Person" means every natural person, firm, copartnership, association or corporation.

(e) "Director" means the Director of Public Safety of the City of Columbus.

(f) "Towing" means the act of pulling or dragging any vehicle behind the wrecker or two truck which is doing such pulling or dragging. Said towed vehicle can be self supporting, carried on a dolly type platform, or be supported on any other item necessary to facilitate such towing. (Ord. 1081-75).

549.02 License required.

No owner of a tow truck shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid tow truck owner's license obtained pursuant to this chapter has been issued and is in force for that tow truck.

No tow truck operator shall engage in the towing of any vehicle within the City of Columbus or offer such service to the owner or operator of any vehicle unless a valid tow truck operator's license obtained pursuant to this chapter has been issued and is in force for that tow truck operator.

This section shall not apply when the property being towed is owned by the person doing the towing of said property or

when the property being towed has been picked up outside the City and is either in the process of being delivered to a location within the City or is being towed through the City to be delivered elsewhere.

Evidence of the ownership of a vehicle being towed shall be presented to any police officer or inspector upon demand and shall consist of either a certificate of title or a bill of sale for said vehicle (ord. 641-77).

549.03 License application.

Every application for such license as required by Section 549.02 shall be made in person at the office of the Director of Public Safety on forms to be provided and such pertinent information as the Director may deem necessary shall be given under oath. It shall be mandatory rejection of such application or revocation of any issued license of any of the required application information is misrepresented or untrue.

(a) Each tow truck license shall be issued upon payment of a seventy-five dollar ($75.00) fee, per year, per truck. Each application for the replacement of a lost, stolen or missing license shall be accompanied by five dollars ($5.00).

(b) Each tow truck operator shall be issued upon payment of a twenty-five dollar ($25.00) fee, and renewals thereof may be issued for a fee of fifteen dollars ($15.00). Each application for the replacement of a lost, stolen or missing license shall be accompanied by a fee of five dollars ($5.00).

(c) If for any reason an application is rejected and no license issued, all accompanying fees shall be returned to the applicant, otherwise the fees collected under the provisions of this chapter shall be placed to the credit of the General Fund of the City of Columbus. (Ord. 454-87).

549.035 License for partial year.

(a) The fee for any tow truck license obtained after the first day of March of any year shall be one-half of the original fee.

(b) The fee for any tow truck operator's license required pursuant to this chapter shall remain unaffected by the terms of this section. (Ord. 1174-73.)

549.04 Issuance of licenses.

(a) Upon approval of a tow truck owner's application, a license and window sticker shall be issued to the owner by the Director of Public Safety. The window sticker shall be placed in the lower right hand corner of the windshield of the licensed tow truck.

(b) Upon approval of a tow truck operator's application, a license shall be issued to the operator which will be carried when in physical control of a tow truck. This license shall be available for inspection upon request of the Director or a police officer. (Ord. 1677-71.)

549.05 Expiration of license.

All tow truck owner licenses issued pursuant to the provisions of this chapter shall expire on the first day of September, 1991, and on September 1 of each year thereafter, following issuance, unless revoked by the Director of Public Safety.

All tow truck operator licenses issued pursuant to the provisions of this chapter shall expire on the first day of December, 1991, and on December 1 of each year thereafter, following issuance, unless revoked by the Director of Public Safety. (Ord. 1534-91.)

549.06 Assignment or transfer of licenses.

(a) No license issued for any tow truck under the provisions of this chapter shall be assigned or transferred to

any other tow truck without the approval of the Director of Public Safety.

(b) No license issued to any tow truck operator under the provisions of this chapter shall be assigned or transferred to any other person. (Ord. 1677-71.)

549.065 Responding to the scene of an accident.

No person, firm, corporation, or other entity shall respond to the scene of an accident, vehicle breakdown or other disabled vehicle for the purpose of soliciting business, or service for compensation of any kind whatsoever unless either summoned by a person having a direct interest in the vehicle or vehicles involved or dispatched thereto as provided in the rules and regulations promulgated by the Safety Director pursuant to Section 549.20. (Ord. 1123-84.)

549.07 License denial, suspension or revocation.

The Director of Public Safety may deny the issuance of any tow truck owner's or operator's license to any person who fails to furnish satisfactory evidence of a good moral character, or to any person who, upon investigation, clearly lacks qualifications and fitness to be licensed under this chapter. Any license granted or issued pursuant to the terms of this chapter to an owner or an operator may be suspended or revoked at any time by the Director upon satisfactory proof of the violation of any provision of this chapter, or upon satisfactory proof of the violation of any of the rules and regulations which the Director promulgates pursuant to Section 549.20, or for any of the reasons which could have been grounds for the refusal to issue an original license. If a license is suspended or revoked after a hearing as set forth in Section 549.08, said license shall be surrendered to the Director's office within five (5) days of notification of such suspension or revocation and the window sticker shall be destroyed.

Any violation of the rules and regulations pertaining to the volunteer towing list will, upon satisfactory proof to the director, result in the immediate proof to the Director, result in the immediate removal of the offending tow truck or tow truck operator from said list. The removed party shall be given the opportunity to appear before the Wrecker Advisory Board for the purpose of explaining the activities which led to the removal from said list, or for the purposes of refuting any evidence presented which led to the removal from said list. Notice of the removal from the volunteer towing list shall be sent to the removed party within three (3) days following removal. Notice of intent on the part of the removed party to appear before the Wrecker Advisory Board shall be sent to the Safety Director's office within three (3) days following receipt of notification of removal from the list. In the event the said violation warrants, further action may be taken against the tow truck or two truck operator pursuant to the terms as set forth in this section. (Ord. 1081-75.)

549.08 Hearings on charges; decision.

No license shall be suspended or revoked until after a hearing had before a hearing officer or employee designated for such purpose by the Director of Public Safety. Notice to the licensee shall be served either personally or by registered mail and shall state the date and place of hearing and set forth the ground or grounds constituting the charges against the licensee. The licensee or registrant shall be heard in his defense either in person or by counsel and may produce witnesses and testify in his own behalf. A stenographic record of the hearing may be taken. The hearing may be adjourned from time to time. The person conducting the hearing shall make a written report of his findings and a recommendation to the Director for decision. A copy of the written report shall be sent to the counsel and to the advisory board. The Director shall review such findings and the recommendation and, after due deliberation, shall issue an order, accepting, modifying or

rejecting such recommendation and dismiss the charges or suspending or revoking the license. For the purpose of this section the Director or any hearing officer or employee designated by him, may administer oaths, take testimony, subpoena witnesses, and compel the production of books, papers, records, and documents deemed pertinent to the subject of investigation. (Ord. 1677-71.)

549.09 Advisory board.

(a) There is hereby established a Wrecker Advisory Board in the Office of the Director. The Board shall consist of the Director or his designate, and four (4) other members appointed by the Mayor, and one of the members so appointed by the Mayor, and one of the members so appointed shall be designated by the Mayor as Chairman. Of the four (4) appointed members, two (2) shall be actively engaged in the wrecker, towing business, one representing the owners and one the drivers; and one (1) shall be a public member; and one (1) shall be a member of the insurance industry. Each appointed member shall serve for a term of four (4) years and until his successor is appointed and qualified except for the first two appointees who shall serve for two years each. Of the first members appointed to serve on this Advisory Board, two (2) shall be appointed for a term of two (2) years, and two (2) for a term of four (4) years.

(b) The members of the Board shall serve without compensation but may be reimbursed for their actual and necessary expenses in attending meetings of the Board.

(c) The Advisory Board shall meet at least two (2) times each year at a time and place within the state designated by the Director. (Ord. 1677-71.)

549.10 Function of the Board

(a) The Board shall advise and consult with the Director of Public Safety concerning practices in the wrecker, towing

business, the administration of this chapter, and the rules and regulations adopted to implement this chapter.

(b) The Board shall undertake activities to encourage high standards of honesty, fair business practices, and public responsibility in the wrecker, towing business, and

(c) The Board shall hear and make recommendations to the Director in any application revocation or suspension proceeding in which the Director may request the Board to conduct such hearings.

(d) The City Attorney shall designate a member of his staff to act and serve as counsel to the Advisory Board to be present at or to review and summarize all hearings and proceedings for suspension and revocation of licenses. (Ord. 1677-71.)

549.11 Judicial review.

The action of the Director of Public Safety in suspending, revoking, or refusing to issue or renew a license may be reviewed by appeal to the Board of License Appeals pursuant to Section 505.06. The Director shall be represented by the City Attorney. (Ord. 2666-80.)

549.12 Official acts used as evidence.

The official acts of the Director of Public Safety and Department shall be prima-facie evidence of the facts therein and shall be entitled to be received in evidence in all actions at law and other legal proceedings in any court or before any board, body or officer. (Ord. 1677-71.)

549.13 Separability clause.

If any portion of this chapter, or any section or part of a section shall be declared by a court of competent jurisdiction to be invalid, such declaration shall be limited solely to that portion, section, or part of section that was directly involved in the controversy before the court upon which judgment was

rendered, and shall not affect or impair the validity of the remainder of the chapter. (Ord. 1677-71.)

549.14 Liability insurance required.

(a) No license to operate any wrecker or tow truck shall be issued or renewed by the Director of Public Safety and it shall be unlawful to operate or permit the operation of any such wrecker unless and until the owner of the same shall deposit and maintain on deposit with the Director a copy of an existing insurance policy or evidence acceptable to the Director of such policy of an insurance company duly licensed to transact such business in the State, or of an insurance company not authorized to transact business in the State, provided such insurance is written through a citizen of the State duly licensed as provided by Ohio Revised Code 3905.30 et seq., insuring within the amounts specified in such policy the owner of such tow truck and also any person operating the same in the City under the authority of such owner, whether such authority be under contract or employment, lease, or other transaction of the owner or owner's assignee or lessee and such person operating such wrecker against loss from the liability imposed by law for damages on account of bodily injuries or death or for damages to property, other than employees, resulting from such ownership, maintenance or use of such wrecker in the City, and agreeing to pay to any judgment creditor to the extent of the respective amounts specified in such policy, any final judgment rendered against the insured or such operator by reason of such liability.

(b) In addition to the insurance required in subsection (a) hereof, a garage keeper's legal liability policy covering fire, theft, and explosion shall be required.

A company not storing vehicles may, on approval of the Director of Public Safety, submit an affidavit which shall state that liability coverage is in effect to cover each vehicle towed

while in their care, custody and control pursuant to Section 549.15(b). A violation of the terms contained in the two owner insurance affidavit will be cause for the suspension or revocation of tow truck owner license(s).

(c) The policy or policies must contain an enforcement providing for ten (10) days notice to the City in the event of any material change or cancellation. (Ord. 2547087.)

549.15 Extent of insurance.

(a) The limit in any such insurance policy described in Section 549.14 of such liability of the insured on account of the ownership, maintenance, and use of each tow truck shall not be less than fifty thousand dollars ($50,000.00) for bodily injures to or death of one person, and subject to such limit as to injury of death of one person; one hundred thousand dollars ($100,000.00) on account of any one accident resulting in injuries to or death of more than one person; and twenty-five thousand dollars ($25,000.00) on account of legally liable damage to property in any one accident.

(b) Fire, theft, and explosion liability policy shall be in a minimum amount of ten thousand ($10,000.00). (Ord. 280-72.)

549.16 Identification of tow trucks.

Every person owning and/or operating a tow truck under a license from the City may adopt any trade name, design, color scheme or method of painting or lettering such tow trucks that is approved by the Director of Public Safety. Such approved trade name, design, color scheme or method of painting or lettering shall include the following matter as specified:

(a) The name of the owner or trade name under which the business in conducted shall be painted on each side of the tow truck in lettering at least four (4) inches in height. The business address and telephone number shall also be painted on each side of the tow truck in lettering to be clearly visible. All

required lettering shall be of such color as in the opinion of the Director will contrast distinctly with the color of the body of the tow truck. Whenever the word "paint" or "painted" is used in this chapter, it shall mean the application of coloring matter in oil solution, not water solution, but decals may be used instead of paint.

(b) The owner of the tow truck may have until the second annual inspection to comply with the size requirement for lettering if at the time of the original inspection the tow truck is lettered with a trade name, business address and telephone number. (Ord. 280-72.)

549.17 Transport sheet required.

Tow truck operators shall at all times maintain a current transport sheet containing the following information in the proper sequence on motor vehicles that are moved from one location to another:

(a) Date and time;

(b) Moved vehicle's owner's name and address;

(c) Moved vehicle's serial of license number; serial number required if vehicle is taken anywhere other than the licensee's lot;

(d) Year, make and model of moved motor vehicle;

(e) Location of origin of transport;

(f) Location of destination of transport;

(g) Amount of charges;

(h) Name of person who authorized transport.

Such entries on the transport sheet are to be made at the time of each act and recorded legibly, accurately, and completely as directed in this section. These transport sheets shall be made available for inspection upon the request of any police officer.

This section shall not apply to tow truck operators in responding to calls pursuant to a pre-existing arrangement with the owner of the vehicle to be moved, or his agent, or with an organization providing such service of which the owner of the vehicle to be moved is a member. (Ord. 1677-71.)

549.18 Required records.

The owner of a tow truck shall maintain an accurate and complete file of transport sheets for each driver that is employed including the owner, if he is also an operator. The transport sheet shall be filed by date of occurrence and retained for a period of six months. Upon the request of the Director of Public Safety or his designee, these records shall be immediately available for inspection. (Ord. 1677.71.)

549.19 Notice of conviction.

Repealed by Ordinance 1081-75.

549.20 Authority to issue rules and regulations.

The Director of Public Safety shall promulgate a set of rules and regulations to implement this chapter as he deems proper (Ord. 1677-71.)

549.99 Penalties.

Whoever violates any provision of this chapter shall be guilty of a misdemeanor of the second degree. Any such violation shall constitute a separate offense on each consecutive day continued. (Ord. 1081-75.)

CITY OF COLUMBUS WRECKER RULES AND REGULATIONS

A. Every person, firm, or corporation licensed under Section 549.02 of the Columbus Wrecker-Towing Ordinance will be governed by the following rules and regulations:

1. Every wrecker and wrecker operator must meet the following minimum requirements:

   a. Each wrecker and its equipment will be of sufficient capacity to safely handle any vehicle towed. The manufacturer's rated capacity of vehicles and equipment shall not be exceeded while towing vehicles.

   b. Each wrecker shall be equipped with a power operated winch, winch line and boom having a manufacturer's rated lifting capacity of not less than 5,000 pounds, single line capacity. Wreckers listed as "Heavy Duty" must be equipped with a power operated winch having a manufacturer's rated lifting capacity of not less than 10,000 pounds single line capacity. Wreckers listed as "Extra Heavy Duty" must be equipped with a power operated winch, having a manufacturer's rating lifting capacity of not less than 30,000 pounds.

   c. Wrecker operators must display a high proficiency in the operation of their tools and equipment. Lifting and towing devices shall be designed and used to permit vehicles to be handled without inflicting damage.

2. Each wrecker shall be inspected annually at the time of licensing or within a reasonable time thereafter, except that a licensee who purchases a new or used wrecker shall be granted a thirty day grace period starting on the day of licensing in order to allow time to prepare the wrecker for inspection. A thirty day temporary permit shall be issued at the time of licensing and shall be displayed on the inside of the lower right corner of the wrecker windshield during the thirty day grace period.

   a. Each wrecker shall be made available for inspection at the request of the police division.

3. An annual windshield sticker shall be issued after the wrecker passes final inspection. Said sticker shall be attached to the inside lower right corner of the wrecker windshield. Windshield stickers shall be removed and destroyed if the owner's wrecker license is revoked, or if the wrecker is sold, or after the current licensing period has expired.

B. When a wrecker licensed by the City of Columbus is inspected, it shall be inspected for the following items:

   1. Brakes; capable of meeting the laws of Ohio, and Section 2137.18 City of Columbus Traffic Code.

   2. Mirrors; should have not less than 45 square inches of area, located in usable position for driver and not to impede vision to front or sides.

   3. Fire Extinguisher; should be at least one quart capacity of approved contents.

   4. Flares; at least six, thirty-minutes flares in a protective container of their choice.

   5. Crane; type of make and capacity.

   6. Safety Chains; shall be attached to or available on vehicle to be used in case of cable breaking or hitch coming loose.

   7. Tow Bar; shall be a device that will hold vehicle a firm distance behind wrecker.

   8. Shovel; carried so it can be used for picking up debris at scene or in cases where moving earth may be necessary.

   9. Broom; long handle heavy duty push or standard broom.

10. Wrecking Bars; any sturdy wrecking bar at least 36" in length.

11. Blocks; two scotch blocks, a snatch block, and a 4" x 4" x 36" board used to protect vehicle when picked up.

12. Tie Rope; sufficient length to tie down parts or secure steering wheel.

13. Hand Tools; standard mechanics hand tools, consisting of wrenches, pliers, screw driver, hammer, etc.

14. Stop Lights; at least two sets of stop lights, one at regular height and one sufficiently high to be seen over towed vehicles.

15. Turn Signals; no less than three sets of Class A turn signals, (1) one set consisting of (2) lights in the front, (1) one set of (2) two lights on the highest point of the vehicle, and (1) one set of (2) two lights in the rear; except where there was no provision made by the manufacturer to allow lights to be installed in the rear bumper plate, the rear set of lights shall also be installed on the highest point of the vehicle.

16. Flasher; shall be capable of flashing all turn signals simultaneously; and that all other flashing equipment on wrecker is working properly.

17. Flood Lights; aimed so as to be of the most assistance to operators when working in rear of wrecker at night.

18. Appearance; paint shall be in good condition and body free from extensive damage.

19. Cleanliness; the interior and exterior of the vehicle shall be free of all dirt and grime; the vehicle shall present a well polished appearance.

20. Identification; name, address, and phone number of the owner, or company must be painted on, or permanently affixed to both sides of the wrecker in a manner that is easily readable. The owner's name or company name must be in letters at least 4" high. The address and phone number may be in letters proportionately smaller.

21. Amber Light; a flashing, oscillating, or rotating amber light shall be permanently mounted so as to be easily visible in all directions, even when towing a vehicle.

C. Anyone contemplating additions or changes in wrecker equipment may request assistance from the License Section to assure themselves of meeting minimum requirements.

D. 1. Any wrecker purchased by the Licensee after January 22, 1972, under 8,000 lbs. G.V.W., cannot be issued a Columbus towing license.

2. Any wrecker purchased by the licensee after July 7, 1977, must meet the following specifications in order to be issued a Columbus Tow Truck License:

Light Duty Wrecker:	3/4 Ton Truck minimum G.V.W. 8,000 pounds. Wrecker 5,000 to 6,000 pounds. Minimum cable 3/8". Power winch, or hydraulic lift.

Light Duty Wrecker:	1 Ton Truck. Minimum G.V.W. 10,000 pounds Power winch. Wrecker 8,000 to 10,000 pounds. Minimum cable 3/8".
Light Heavy Duty Wrecker:	1-1/2 Ton Truck. Minimum G.V.W. 15,000 pounds Power winch. Wrecker 12,000 to 20,000 pounds. Minimum cable 3/8".
Medium Heavy Duty Wrecker:	2 Ton Truck. Minimum G.V.W. 20,000 pounds Power winch. Wrecker 24,000 to 32,000 pounds. Minimum cable 7/16".
Heavy Duty Wrecker:	2-1/2 Ton Truck. Minimum G.V.W. 28,000 pounds Power winch. Wrecker 34,000 to 50,000 pounds. Minimum cable 1/2".
Extra Heavy Duty Wrecker:	3 Ton Truck. Minimum G.V.W. 35,000 pounds Power winch. Wrecker 52,000 to 100,000 pounds. Minimum cable 5/8".

WRECKER INSPECTION SHEET

PASSED:_____
REJECTED:_____
REINSPECTED:_____
INSPECTED BY:_____
DATE:_____

COMPANY NAME_____
LIC. PLATE #_____
SERIAL #_____
G.V.W._____

Make Crane:_____Crane Ser.#_____

No. Cables and Cond._____

_____Wheel Lift _____Rollback

_____Headlights
_____Turn Signals
_____Flashers
_____Windshield
_____Wiper/Washer
_____Horn
_____Brake Lights
_____Beacon
_____Flood Lights
_____Emergency Brake
_____Fire Extinguisher
_____Tie Rope
_____Hand Tools
_____Flares (6-30 min.)
_____Broom
_____Shovel

_____Wrecking Bar
_____4"x4"x36" length
_____Snatch Block
_____2 Scotch Blocks
_____Safety Chain(s)
_____Straps (condition)
_____Lettering
_____Tires
_____Mud Flaps
_____Interior
_____Body (condition)
_____Cleanliness
_____Litter Container
_____Mirrors
_____Tow Bar
_____Dollys
_____Sling (condition)

Supreme Court, U.S.
FILED
NOV 6 2001
CLERK

No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN, and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

QUESTION PRESENTED

Does the preemption clause of the Interstate Commerce Act, 49 U.S.C. § 14501(c), expressly preempt those municipal regulations that apply to consensual towing operations, as the court below held consistent with the holdings of other federal appellate courts and state courts of last resort?

LIST OF PARTIES

The only parties to this proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.1, the Court is advised that respondent has no parent companies or subsidiaries that are not wholly owned.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 5

I. THIS CASE PRESENTS NO ISSUES WORTHY OF REVIEW CONCERNING THE PERMISSIBLE SCOPE OF MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS 6

A. The Case Law in the Lower Courts Continues to Evolve in New Directions to Address the Practical Concerns Raised by Petitioners 6

B. There Is No Square Decisional Conflict Here 9

C. The Court Has Denied Review on These Issues Several Times and Nothing Has Occurred in the Interim to Justify Plenary Review Here 17

II. THE COURT BELOW CORRECTLY JOINED THE CIRCUIT COURTS HOLDING THAT MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS IS EXPRESSLY PREEMPTED 18

CONCLUSION 23

TABLE OF AUTHORITIES

PAGE

Cases

Ace Auto Body & Towing, Ltd. v. City of New York, No. 96-CIV-6547, 1997 WL 669891 (S.D.N.Y. Oct. 28, 1997), *aff'd*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999) 3, 12, 13, 14
Ace Auto Body & Towing Ltd. v. City of New York, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999) ..... *passim*
Bates v. United States, 522 U.S. 23 (1997) 20
Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998) 20
BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 20
Brown v. Gardner, 513 U.S. 115 (1994) 20
Building & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) 7
Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999) 7, 15
City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) 20
Custis v. United States, 511 U.S. 485 (1994) 20
FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994) 20
Field v. Mans, 516 U.S. 59 (1995) 20
Hohn v. United States, 524 U.S. 236 (1998) 20
Keene Corp. v. United States, 508 U.S. 200 (1993) 20
Michigan Trucking Ass'n v. Michigan Pub. Serv. Comm'n, 571 N.W.2d 734 (Mich. App. 1997), *app. denied*, 583 N.W.2d 900 (Mich. 1998) 9, 10
People ex rel. Renne v. Servantes, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (Cal. App. 1st Dist. 2001), *review denied*, No. S095954 (Cal. May 16, 2001), *cert. pending* (Case No. 01-336) 10, 11, 12, 17

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Petrey v. City of Toledo, 61 F. Supp. 2d 674 (N.D. Ohio 1999), *rev'd in part*, 246 F.3d 548 (6th Cir. 2001) 5
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) ..... *passim*
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) ..... *passim*
Russello v. United States, 464 U.S. 16 (1983) 20
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir.), *reh'g denied*, 266 F.3d 342 (5th Cir. 2001) 7, 15, 16, 17
Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001) ..... *passim*
United States v. Gonzales, 520 U.S. 1 (1997) 20
Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 19

Statutes and Rules

7 U.S.C. § 136v(a) 19
49 U.S.C. § 14501(c) ..... *passim*
Cal. Bus. & Prof. Code § 17200 *et seq.* 12
Cal. Veh. Code § 22658 11
Columbus City Code §§ 549.01-.99 ..... 4, 5
Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899 ..... 12, 21
H.R. Conf. Rep. No. 103-677 (1995), *reprinted in* 1994 U.S.C.C.A.N. 1715 21
H.R. Rep. No. 104-311 (1995), *reprinted in* 1994 U.S.C.C.A.N. 793 22

No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN,
and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and
THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari in this case. The petition raises no legal issues of general importance beyond the facts of this particular case or that otherwise would merit the Court's plenary review.

Although petitioners paint the statutory issues with a broad brush, there is as yet no concrete split in authority among the lower courts that is of any practical consequence. Four federal courts of appeals, including the court below, have now ruled that the preemption clause of the Interstate Commerce Act, 49 U.S.C. § 14501(c), preempts municipal regulations that apply to consensual towing operations. Putting aside the unappealed rulings of various federal trial courts, no court has ruled to the

contrary. Although the lower courts have disagreed on certain elements of the legal analysis in some of their opinions, all have agreed that the application of municipal regulations to *consensual* towing operations, which amounts to bare economic regulation, poses quite distinct issues from their application to *nonconsensual* towing operations, which raises distinct and more significant safety concerns. Only the former category has been put at issue in this case.

Once the grounds of this distinction are understood, the supposed split in authority dissolves, and each of the cases cited by petitioners as allegedly reaching a conflicting result is squarely distinguishable on its facts. Moreover, the principal safety concerns noted by petitioners are easily resolved within the contours of the uniform authority set out in the lower court decisions to date. In particular, the law in this area continues to evolve, and the lower courts now are regularly upholding municipal regulation of nonconsensual towing operations under the "municipal proprietor" exception to preemption that this Court recognized in *Building & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226-29 (1993). This recent development is not directly at issue in this case, yet it further diminishes the practical importance of the statutory exemption to express preemption contained in 49 U.S.C. § 14501(c)(2)(A).

Finally, the Court has examined the putative conflict raised here on several prior occasions – including earlier this year – and has consistently deemed it unworthy of plenary review. *See, e.g., Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001); *Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Nothing has occurred in the interim to alter this correct assessment.

STATEMENT OF THE CASE

1. Respondent Ours Garage and Wrecker Service, Inc. ("Ours") is an Ohio corporation that operates a towing business, with its principal place of business located in Licking County, Ohio. Respondent Towing and Recovery Association of Ohio is a trade organization comprising members who do business in the towing and recovery industry in Ohio. *See* Pet. App. 1a-2a.

The towing work performed by Ours and other tow-truck operators generally breaks down into two distinct categories. "Consensual" tows are all those performed at the request of the vehicle owners, who select the towing operators they wish to use and contract with them to perform the necessary services, which may include towing, storage, security, and repair of the vehicle. "Nonconsensual" tows are all those performed without the consent of the vehicle owners. The latter category may include the towing of vehicles that are stolen or abandoned, or vehicles that are disabled in an accident when towing is directed by police or other public officials vested with such authority. Whenever feasible, the owner is required to bear the cost of such nonconsensual towing operations, which may also involve related services such as storage, security, and repair.

This distinction between consensual towing operations and nonconsensual towing operations is reflected in many state and municipal regulations in this area. *See, e.g., Petrey v. City of Toledo*, 246 F.3d 548, 551-52 (6th Cir. 2001) (distinguishing between Class A licenses, which permit holder "to conduct non-consensual tows ordered by the Toledo Police Department," and Class B licenses, which permit holder "to conduct private and third-party tows") (reprinted at Pet. App. 5a-7a).[1] The same

---

[1] *See also, e.g., Ace Auto Body & Towing, Ltd. v. City of New York*, 1997 WL 669891, at *1-4 (S.D.N.Y. Oct. 28, 1997) (distinguishing between general towing regulations and DARP, SARD, and ROTOW accident management programs that govern disabled, stolen, and abandoned vehicles), *aff'd*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999); *Tocher v. City of Santa Ana*, 219 F.3d

distinction also is expressly reflected in the preemption clause of the federal statute at issue in this case. *See* 49 U.S.C. § 14501(c)(2)(C) (preemption of state or local regulation "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle").

2. The City of Columbus has adopted ordinances that govern towing operations within the municipal limits, *see* Columbus City Code §§ 549.01-.99 (reprinted at Pet. App. 36a-47a), and the Columbus Director of Public Safety has exercised the delegated authority to issue additional rules and regulations governing towing operations, *see* City of Columbus Wrecker Rules and Regulations (reprinted at Pet. App. 47a-53a). In general, these regulations govern licensing and recordkeeping, and they make no distinction between *consensual* towing operations and *nonconsensual* towing operations. *See id.*

3. Respondents commenced this declaratory judgment action in federal district court, contending that Columbus' towing regulations are expressly preempted by the Interstate Commerce Act insofar as they apply to consensual towing operations. *See* Complaint ¶¶ 6-8 (R.1; J.A. 6-7).[2] The parties agreed that the facts were undisputed and filed cross-motions for summary judgment. The District Court (S.D. Ohio, Smith, J.) granted summary judgment for respondents, holding that the regulations were preempted "for the reasons set forth in the

---

1040, 1043 (9th Cir. 2000) (describing city's "dual permit system" that distinguishes between regulation of general towing operations and establishment of a "rotational tow list" of designated towing companies used for vehicle impoundment), *cert. denied*, 121 S. Ct. 1085 (2001).

[2] "R." denotes references to the record compiled in the District Court. "J.A." denotes references to the Joint Appendix that the parties submitted to the Court of Appeals below.

virtually identical cases of *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1334 (1999) and *Anna Petrey dba Magnum Towing v. City of Toledo*, 61 F. Supp. 2d 674, 677-680 (N.D. Ohio 1999)." Pet. App. 34a.

4. While petitioners' appeal was pending, the Sixth Circuit (Keith, *Batchelder*, Moore, JJ.) issued its decision in the *Petrey* case. The City conceded that "*Petrey* controls the disposition of this case." Pet. App. 2a. The Court of Appeals noted that respondents had brought this case to enjoin enforcement of Chapter 549 of the Columbus City Code, "which regulates consensual towing operations." *Id.* It also noted that in *Petrey*, "we held that the ICA does not preempt municipal licensing and safety regulation of non-consensual towing operations when a municipality acts as a market participant, but does preempt other regulation not falling within this narrow exception." *Id.* Based on the *Petrey* decision, therefore, the Court of Appeals simply affirmed the judgment of the District Court in a brief opinion. *See id.*

REASONS FOR DENYING THE WRIT

The preemption issue presented in this case – with respect to consensual towing operations – is not certworthy because petitioners are unable to show either that a *bona fide* conflict exists among the federal circuit courts and state courts of last resort or that the Sixth Circuit's decision departed from any of the Court's precedents. The circuit courts have consistently held that municipal regulation of consensual towing operations, amounting to bare economic regulation of private commercial arrangements, is preempted. The Court has previously considered and denied other petitions for certiorari on the statutory issues raised here, and nothing has occurred in the interim to warrant plenary review in this case.

Once the practical safety concerns discussed by petitioners are placed in context of the distinction drawn in the statute and the case law between municipal regulation of consensual and

nonconsensual towing operations, it becomes clear that these concerns can be addressed in several ways that are already being implemented by other municipalities. The evolving case law in the lower courts now consistently upholds measures applicable to nonconsensual tows under the "municipal proprietor" exception to preemption. Thus the legal issues that petitioners purport to distill out of these proceedings are not cleanly presented in this case, which does not even raise any preemption issue with respect to nonconsensual tows. For all of these reasons, the Court should deny the petition.

THIS CASE PRESENTS NO ISSUES WORTHY OF REVIEW CONCERNING THE PERMISSIBLE SCOPE OF MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS.

A. The Case Law in the Lower Courts Continues to Evolve in New Directions to Address the Practical Concerns Raised by Petitioners.

Petitioners contend that the decision below conflicts with decisions by two state courts of last resort and one other circuit court. *See* Pet. 7-13. The practical issue that petitioners generally identify as giving rise to the alleged conflict is "whether municipalities may promulgate public-safety regulations regarding the use of tow trucks within their city limits," including the ability to adopt safety regulations "aimed at eliminating the practice of 'chasing' – where tow trucks race one another to an accident scene in competition for business." *Id.* at 2 (quotation omitted).

As thus stated, the issue is framed far too broadly, for the case law now plainly holds that municipalities *do* have ample authority to adopt extensive regulations designed to eliminate such practices and protect the public safety, at least with respect to *nonconsensual* towing operations, where the safety concerns are most prevalent. Indeed, that is the square holding of the *Petrey* case, which provided the entire basis for the ruling below in this case. *See id.*, 246 F.3d at 553-59 (upholding Toledo's

regulations that govern "non-consensual police tows for the City" because they fall within the "municipal proprietor" exception to preemption, but holding that other regulations applicable to consensual towing operations are preempted) (Pet. App. 10a-20a). Other recent decisions are to the same effect. *See Stucky v. City of San Antonio*, 260 F.3d 424, 434-46 (5th Cir.) (under municipal proprietor exception to preemption, city can regulate nonconsensual tows but not consensual tows, and regulations that apply to latter are preempted by federal law), *reh'g denied*, 266 F.3d 342 (5th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045-52 (9th Cir. 2000) (same), *cert. denied*, 121 S. Ct. 1085 (2001); *see also Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691-95 (5th Cir. 1999) (upholding city's nonconsent towing ordinance under municipal proprietor exception to preemption).

Under the contours of the "municipal proprietor" doctrine, federal preemption of state and local regulatory authority is inapplicable to instances where a state or local government is acting as a market participant, and thus is acting in a proprietary capacity. *Building & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226-29 (1993); *see also id.* at 227 ("Our decisions in this area support the distinction between government as regulator and government as proprietor."). Thus the doctrine applies whenever municipalities mandate and direct nonconsensual tows for vehicles that are disabled in accidents or for vehicles that appear to be abandoned or stolen. Because the lower courts now are coming to rely on this rationale to uphold most municipal safety regulations, this evolving line of precedents renders subsection (c)(2)(A) of no practical relevance in such cases. From this standpoint, petitioners' claim that "acute public-safety issues [are] implicated by resolution of the [statutory] issue" raised on the facts of this case – which concerns only respondents' challenge to municipal regulation of *consensual* towing operations – is considerably overstated. Pet. 2-3.

Petitioners frame the specific legal issue here as concerning whether the statutory safety exemption set out in 49 U.S.C. § 14501(c)(2)(A) exempts "local tow-truck regulations" from falling within the provisions of the express preemption clause set out in 49 U.S.C. § 14501(c)(1). *Id.* at 7. Yet this articulation of the issue glosses over the key distinction between consensual and nonconsensual towing operations that has been drawn by Congress and the courts. The *Petrey* decision is exemplary in this regard. In that case, plaintiff and her towing company challenged the two-tier regulatory system adopted by the City of Toledo to govern towing operations within the municipal limits. Under that system, a "Class B" license permitted a tower to conduct private and third-party tows; and a "Class A" license, which imposed "more onerous and expensive requirements," was required to "conduct non-consensual tows ordered by the Toledo Police Department," which were conducted by dividing the city into a number of police towing districts and parceling out the work among the Class A licensees on a rotating basis. *Id.*, 246 F.3d at 551-52 (Pet. App. 6a-7a). The Sixth Circuit ruled in favor of plaintiff's preemption challenge to the Class B licensing scheme, finding that the city's efforts to impose economic regulations on consensual towing operations are squarely preempted under 49 U.S.C. § 14501(c). *See Petrey*, 246 F.3d at 559-64 (Pet. App. 20a-29a). At the same time, however, it upheld the city's Class A licensing scheme and system of rotating nonconsensual tows, based on the municipal proprietor exception to preemption. *See id.* at 555-59 (Pet. App. 13a-20a).

This case does not raise the same preemption issues because respondents have challenged only the enforcement of the municipal ordinance "which regulates consensual towing operations." Pet. App. 2a. Thus the issues raised here are limited to municipal regulation of traditional commercial transactions devoid of most safety concerns, and the court below did not have the occasion to apply all the parameters of its broader holding in *Petrey* that "the ICA does not preempt

regulation of non-consensual towing operations when a municipality acts as a market participant." *Id.* Indeed, this case raises no issues about the validity of municipal regulation of *nonconsensual* tows at all.

To summarize, the legal issue framed by petitioners here – whether the statutory safety exemption set out in subsection (c)(2)(A) exempts "local tow-truck regulations" from falling within the provisions of the express preemption clause set out in subsection (c)(1), Pet. 7 – misses the point that the lower courts have now largely settled the validity of such regulations as have been adopted to address key safety problems such as "chasing." These measures, which utilize nonconsensual tows, are now being consistently upheld under a *different* exception to federal preemption: the municipal proprietor exception.[3]

B. There Is No Square Decisional Conflict Here.

Particularly in light of the foregoing discussion, an examination of each case cited by petitioners to establish an ostensible split in authority reveals that the occasional differences in legal analysis that petitioners highlight have not yet produced any square conflict in the holdings actually reached by those courts.

First, the intermediate state court ruling in *Michigan Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 571 N.W.2d 734 (Mich. App. 1997), *app. denied*, 583 N.W.2d 900 (Mich.

---

[3] For this reason, petitioners' statement that "the consequence of the Sixth Circuit's decision [in this case] is to force Ohio to enact any such regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets," Pet. 15, is completely incorrect. On the contrary, as shown above, municipalities are experiencing little trouble in recent cases defending their safety regulations governing *nonconsensual* towing operations under the municipal proprietor exception to preemption. Consequently, the anxiety that petitioners express about "Federal-State comity," based on their concern that the decision below may "upset this traditional allocation of State power," *id.*; *see also id.* at 22, is misplaced.

1998), is entirely inapposite to the issues raised here. Indeed, that case did not involve towing operations at all. Instead, it concerned whether the Michigan Public Service Commission was authorized to implement a safety rating system for all motor carriers, or whether this system was preempted under 49 U.S.C. § 14501(c). The court upheld the Commission's actions because "it is difficult to conceive of an order that would fall more directly than the one at issue into the express exemption for safety regulation from the scope of preemption." *Michigan Trucking Ass'n*, 571 N.W.2d at 736-37. This unobjectionable conclusion obviously does not raise the same issues presented by the decision below in this case. In particular, because that case did not even involve municipal regulations, the court never cited or had any occasion to consider the application of subsection (c)(2)(A).

Second, the intermediate state court ruling in *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (Cal. App. 1st Dist. 2001), *review denied*, No. S095954 (Cal. May 16, 2001), *cert. pending* (Case No. 01-336), while sharply critical of the line of decisions later joined by the court below, explicitly rested its judgment on two adequate and independent state grounds. In *Servantes*, the San Francisco City Attorney brought suit against a towing company and its owner for unfair business practices under California law, seeking civil penalties and disgorgement of profits as well as a permanent injunction against further unlawful conduct. Following a six-day trial, the trial court found that the defendant "had committed hundreds of violations of state and local laws and ordered him to pay a civil penalty of $74,700." 103 Cal. Rptr. 2d at 873. The illegal acts documented at trial included repeated instances of unauthorized tows where the owners were later forced to pay cash in order to retrieve their vehicles. *Id.* at 874-75.

On appeal, defendant argued that the state and local laws under which he was found liable were preempted by federal law and thus unenforceable. The state court of appeals rejected his arguments that San Francisco's towing regulations were

preempted, focusing in particular on its disagreements with the Ninth Circuit's analysis in the *Tocher* case, which it noted was not considered binding upon the state courts. *See id.* at 876-80. The court then went on to make clear, however, that all of this discussion of the municipal regulations amounted to *dicta* because its ruling also rested on alternative grounds under California law:

> In any event, even if we were to conclude otherwise and find the San Francisco ordinances preempted by the FAAA Act, we would have no hesitation in affirming the trial court's judgment here. The trial court principally based its judgment upon Servantes' violations of state law, specifically Vehicle Code section 22658.[4] Although the court additionally found that Servantes had violated the permit requirements of the San Francisco Police Code, the court imposed no additional penalties on account of these particular violations.

Id. at 881. Accordingly, the court held that the trial court's ruling was fully subject to affirmance based *solely* on defendant's repeated violations of *state* law, even aside from his additional violations of any municipal regulations.

In addition, the court continued on to identify yet another adequate and independent ground for its decision under state law:

> Furthermore, California's Unfair Competition Act prohibits not only unlawful business practices but also

---

[4] As the *Servantes* court had explained elsewhere in its opinion, the State of California itself has enacted statutes that regulate the removal of vehicles from private property by a towing service, which require notification of the police, authorization from the property owner, the acceptance of credit card payments, and compliance with restrictions on excessive charges, all of which is enforced by civil penalties. *See* 103 Cal. Rptr.2d at 873 & n.3 (discussing the provisions of Cal. Veh. Code § 22658).

> unfair business practices. (Bus. & Prof. Code § 17200 et seq.) The statute is intentionally broad to give the court maximum discretion to control whatever new schemes may be contrived, even though they are not yet forbidden by law. . . . Here, the injuries inflicted upon the unwitting victims were substantial, while the conduct of Servantes was entirely unethical and unscrupulous with no redeeming value. . . .
>
> We find no error in the trial court's conclusion that the conduct of Servantes constituted unlawful business practices in violation of Business and Professional Code section 17200 et seq.

Id. Thus the court made clear that its decision did not depend at all on whether defendant was found to have actually *violated* any valid state or local regulations. Accordingly, its preemption analysis was in no way essential to its judgment affirming the trial court. For this reason also, therefore, the state court's ruling in *Servantes* poses no direct conflict with the ruling below in this case.

Third, the Second Circuit's decision in *Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999), is also distinguishable from the decision below in this case. *Ace Auto* was one of the first cases brought after Congress amended the preemption clause in the ICA by enacting the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. In that case, a group of tow truck companies brought a declaratory judgment action contending that certain of New York City's towing regulations were preempted under 49 U.S.C. § 14501(c). Plaintiffs sought a preliminary injunction, and after submitting all relevant evidence, plaintiffs "specifically limited their motion for a preliminary injunction to discrete aspects of the regulations governing the towing of vehicles disabled in the context of accidents." *Ace Auto Body & Towing, Ltd. v. City of New York*, No. 96-CIV-6547, 1997 WL 669891, at *1 (S.D.N.Y. Oct. 28, 1997), *aff'd*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999). The trial court denied plaintiffs' motion, finding that the challenged measures were exempt from preemption under the safety regulation exemption contained in subsection (c)(2)(A). *See id.* On cross-motions for summary judgment, the trial court reached the same conclusion, finding that the challenged regulations were not preempted.[5]

The measures at issue in *Ace Auto* concerned the eligibility requirements for and the administration of New York City's regulations governing *nonconsensual* towing of vehicles that were either disabled in accidents or were abandoned or stolen. The City had adopted three related programs to deal with such vehicles. The DARP and SARD programs[6] were adopted for the express purpose "of eradicating the problem of accident 'chasing' in the tow truck industry," whereby tow trucks monitored police reports and raced one another to the scene of an accident to procure any towing business generated there. *Id.* at *7. This goal was accomplished by dividing the City into specific zones and requiring any disabled vehicle to be towed by a qualified towing company summoned to the scene by the Police Department, regardless of the owner's wishes in the matter. *See id.* at *2-4. "For this reason, towing in the context of vehicular accidents is deemed to be 'nonconsensual,' as the vehicle owner has no other lawful towing option." *Id.* at *2.

---

[5] The only ground on which the trial court granted relief to the plaintiffs concerned the unrelated issue of the City's single maximum rate scheme as applied to consensual tows. The parties stipulated that this provision was preempted by negative inference from subsection (c)(2)(C), which expressly allows state and local governments to regulate the price of nonconsensual tows, and argued only over whether Congress had exceeded its authority under the Commerce Clause by enacting this provision, a claim that the trial court rejected. *See Ace Auto*, 1997 WL 669891, at *11.

[6] "DARP" is the acronym for the "Directed Accident Response Program," and "SARD" is the acronym for the "Special Accident Response Districts" program. "ROTOW" is the abbreviation used to designate the "Rotation Tow Program." 1997 WL 669891, at *2, 4.

The ROTOW program, which also operates by dividing the City into zones, governs "the removal of vehicles suspected of having been stolen or abandoned," and "[t]owing under ROTOW therefore is nonconsensual, by definition." *Id.* at *4 (quotation omitted). Plaintiffs challenged the validity of these measures along with the City's general licensing and other eligibility requirements to participate in these programs, all of which the trial court upheld.

Significantly, in *Ace Auto* the trial court *did not even address* the statutory preemption issue highlighted by petitioners here – whether the statutory safety exemption set out in subsection (c)(2)(A) extends not only to state towing regulations, but also exempts "local tow-truck regulations" from the scope of the express preemption clause set out in subsection (c)(1). Pet. 7. Instead, in a footnote the court simply noted that plaintiffs had *conceded* this point: "Plaintiffs do not dispute that the exception provided by Section 14501(c)(2)(A), limited in terms to the 'safety regulatory authority of a *State*,' *id.* (emphasis added), applies as well to the safety regulatory authority of a *municipality* such as the City." *Ace Auto*, 1997 WL 669891, at *7 n.7. Thus the trial court's discussion of the statutory preemption issue was limited primarily to consideration of whether the DARP, SARD, and ROTOW programs, along with the related licensing regulations that governed eligibility for them, could be legitimately classified as "safety" regulations within the meaning of the federal statute. The trial court had no trouble concluding that they could. *See id.* at *7-11.

On appeal, the Second Circuit affirmed. It began by agreeing that the DARP, SARD, and ROTOW programs were clearly enacted for safety reasons, "to combat the practice of 'chasing'" and to remove "'abandoned and stolen vehicles that may (for example) present hazards to other motorists or opportunities for misuse to criminals or children.'" *Ace Auto*, 171 F.3d at 774 (quoting trial court opinion). It then went on, at its own initiative, to consider the views stated in *R. Mayer of*

Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), where the Eleventh Circuit had concluded that 49 U.S.C. § 14501(c)(1) expressly preempts "municipal ordinances that are 'related to' the price, route, or provision of consensual towing operations," even though plaintiffs had defaulted this point in the trial court. *Id.* at 545; *see* 1997 WL 669891, at *7 n.7. Without taking note of the substantive distinction between municipal regulation of *consensual* towing services, which were solely at issue in the *R. Mayer* case, and the DARP, SARD, and ROTOW programs regulating *nonconsensual* towing, the Second Circuit disagreed with the Eleventh Circuit's statutory analysis of subsection (c)(2)(A). *See Ace Auto*, 171 F.3d at 775-76. It then went on to uphold the licensing and eligibility requirements applicable to these programs, including the special requirements that DARP and SARD participants must maintain their own storage and repair facilities. *See id.* at 769, 776-77.

Neither *R. Mayer* at the time, nor any of the subsequent decisions by the federal appellate courts, is in conflict with the Second Circuit's concrete holding in *Ace Auto* – that 49 U.S.C. § 14501(c)(1) does not preempt municipal safety regulations governing *nonconsensual* tows that are performed under the direction of the local police. Both *R. Mayer* and the rulings in this case involved only limited challenges to local regulations governing *consensual* towing operations, which the courts have consistently held to be preempted. In the other cases, such as *Petrey*, *Stucky*, and *Tocher*, the circuit courts likewise have distinguished between local regulations governing consensual tows, which are preempted, and those governing nonconsensual tows performed at the direction of municipal officials, which are not preempted under the municipal proprietor exception to federal preemption. *See Stucky*, 260 F.3d at 434-46 (city can regulate nonconsensual tows but not consensual tows, for the latter are preempted); *Petrey*, 246 F.3d at 555-64 (same) (Pet. App. 13a-29a); *Tocher*, 219 F.3d at 1045-52 (same); *see also Cardinal Towing*, 180 F.3d at 691-95 (upholding city's nonconsent towing ordinance). It is true that the Second Circuit

reached that result by a different route than the other circuits – the Second Circuit used the statutory exemption in subsection (c)(2)(A) to uphold nonconsensual tows, whereas the others used the municipal proprietor exception. And it is true that the lower courts have disagreed at times over the proper interpretation and application of the statutory exemption for safety regulations that is contained in subsection (c)(2)(A). Nonetheless, a mere difference in legal analysis does not rise to the level of conflicting judgments and does not support petitioners' claim that a cognizable split exists among the relevant decisional authorities here.[7]

Petitioners acknowledge that the clear weight of lower court authority on the statutory preemption issues they have raised favors respondents. *See* Pet. 6. But there is no disagreement at all on the issue presented in *this* case: whether municipal regulation of consensual towing operations is preempted. And even the lower court decisions concerning nonconsensual tows – not directly at issue here – are all reconcilable as discussed above. In sum, no square conflict exists among the lower court decisions that would justify plenary review in this case or in any other case at this time.[8]

---

[7] Respondents agree with petitioners that the district courts have issued disparate opinions on the preemption issues raised in these cases, but would note that *all* of the district court rulings cited in the petition, *see* Pet. 14, have arisen out of the Fifth, Sixth, and Ninth Circuits, and thus are now reconciled by the consistent and controlling authority of the circuit court decisions in *Stucky*, *Petrey*, and *Tocher*.

[8] The foregoing discussion also dispels petitioners' assertions that "the Sixth and Ninth Circuits on the one hand and the California and Michigan state courts on the other have reached different conclusions about the same issue and with respect to the same jurisdiction," Pet. 13; *see also id.* at 15, at least insofar as this alleged disharmony between overlapping authorities is offered as a further justification for granting plenary review in this case.

C. The Court Has Denied Review on These Issues Several Times and Nothing Has Occurred in the Interim to Justify Plenary Review Here.

The statutory preemption issues raised in this case have come before the Court on several prior occasions. *See Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Each time, the Court has found these issues to be unworthy of review. The ostensible conflict between *Ace Auto*'s holding endorsing the validity of safety regulations governing *nonconsensual* tows and the substantial line of circuit court decisions holding that municipal regulation of *consensual* towing operations is preempted was presented in each of these cases, and this Court found no need to act. Indeed, earlier this year, the Court denied a petition for certiorari in another such case without even calling for a response. *See, e.g.*, *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001).

Nothing has occurred in the interim to alter the Court's considered judgment that these issues do not justify a grant of plenary review. Earlier this year, an intermediate state court in California decided the *Servantes* case, and sharply criticized the Ninth Circuit's statutory analysis in *Tocher*. Yet, as discussed above, that intermediate state court also placed its decision on two independent state grounds, thereby revealing that much of its criticism is properly regarded as *dicta*. *See supra* pages 9-11. Since then, the Fifth Circuit has decided *Stucky*, and the lower court here has decided both *Petrey* and this case – all of which agree with the existing mass of decisional authority that municipal regulation of consensual towing operations is expressly preempted. In addition, both *Stucky* and *Petrey* reflect the continuing development and increasing acceptance of the municipal proprietor exception to preemption as grounds for upholding municipal safety regulation in this area. *See Stucky*, 260 F.3d at 434-46 (under municipal proprietor exception to

preemption, city can regulate nonconsensual tows but not consensual tows, and regulations that apply to latter are preempted by federal law); *Petrey*, 246 F.3d at 555-64 (same) (Pet. App. 13a-29a); *see also Tocher*, 219 F.3d at 1045-52 (same). This evolution of the legal analysis in the lower courts continues to undercut the importance of the narrower statutory issue of how to reconcile the terms of the statutory exemption in subsection (c)(2)(A) with the terms of the express preemption clause in subsection (c)(1), thereby making it even less urgent for the Court to intervene to address these issues at this time.

Moreover, even if the alleged conflict did exist, and even if its consequences were as important as petitioners claim, this case would be a poor vehicle for resolving it. First, the brief opinion that was issued below undertook no independent review of the City of Columbus' towing regulations. Instead, it simply rested on the City's stipulation that the legal issues here were controlled by the lower court's recent decision in the *Petrey* case, and thus decided without more that the regulations are invalid as applied to consensual towing operations. *See* Pet. App. 2a. The court below thus had no occasion in this case – in contrast to *Petrey* and other recent cases – to consider *either* the effect of the "municipal proprietor" exemption to the express preemption clause *or* the validity of the City's regulations as they apply to nonconsensual towing operations. The lower courts' legal analysis of the City's attempts to regulate consensual towing operations thus occurred in something of an analytical vacuum here, divorced from the principal safety issues raised in many of the other cases. As a result, this case does not represent a suitable vehicle for deciding the central preemption issues raised under this federal statutory scheme.

II. THE COURT BELOW CORRECTLY JOINED THE CIRCUIT COURTS HOLDING THAT MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS IS EXPRESSLY PREEMPTED.

Petitioners also contend that the court below erred in "holding that the City of Columbus may not regulate private

towing activities in the same way that the City of New York may." Pet. 16. As discussed earlier, this contention as stated is inaccurate, since the DARP, SARD, and ROTOW regulatory safety programs that the Second Circuit upheld in *Ace Auto* would all be exempt from preemption as well under the Sixth Circuit's analysis and holding in the *Petrey* case. But in any event, the decision below on the statutory preemption issue, which petitioners concede is consistent with the great weight of lower court authority, is entirely correct and harmonizes with this Court's controlling precedents in this area.

In particular, petitioners contend here, as they did below, that this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), compels a different result. In that case, the Court held that under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the states were permitted to redelegate authority to political subdivisions to regulate pesticides, even without explicit statutory language so providing, where FIFRA simply says, without elaboration, that a "State" may regulate pesticides. *See* 7 U.S.C. § 136v(a). The Court accepted this unexceptionable proposition in the course of deciding that the regulations at issue were valid because Congress had not provided for express preemption or field preemption in FIFRA, and there was no basis for finding implied preemption under the circumstances presented. *See Mortier*, 501 U.S. at 604-16.

As the lower courts have recognized, the statutory framework under the ICA differs from FIFRA in significant respects. First, unlike FIFRA, the ICA contains an express preemption clause that clearly applies both to state and local governments. *See* 49 U.S.C. § 14501(c)(1). Thus, the issue here is not whether preemption should be *inferred* – whether lightly or otherwise – since Congress specifically provided for it. Instead, the issue is how broadly to read a statutory *exception* to an express preemption clause. Hewing to a careful analysis of the statutory text, the courts have noted that because Congress employed the term "political subdivision" no fewer

than *seven* times in this *single* statutory section containing the express preemption clause, but declined to include that term in subsection (c)(2)(A), it must be presumed to have acted purposely and its intentional choice must be given effect. *See, e.g.*, *Petrey*, 246 F.3d at 561; *R. Mayer*, 158 F.3d at 545.

This is, indeed, a much more pointed and forceful instance of the standard canon of statutory construction that when "Congress includes particular language in *one section* of a statute but omits it in *another section* of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added). This time-honored canon may be invoked by the Court more frequently than any other, and has long been established as an essential guide to determining the plain language of congressional enactments.[9] Here, where Congress repeatedly used the same language in the same section and then notably omitted it from one particular subsection, the applicability of this canon is at its zenith.

Without belaboring the merits of the ruling below, there are other sound reasons why the circuit courts have generally been persuaded to construe the statutory exemption from express preemption in subsection (c)(2)(A) as not encompassing municipalities. First, this reading of the express preemption

---

[9] *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 250 (1998); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998); *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Field v. Mans*, 516 U.S. 59, 67 (1995); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Custis v. United States*, 511 U.S. 485, 492 (1994); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

clause in section 14501(c) furthers the policy of deregulation underlying enactment of the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. That legislation, which abolished the ICC and cleared the way for nationwide deregulation of motor carriers, advanced its deregulatory objectives by ensuring their freedom from an entangling web of overlapping and contradictory regulations at the local level. *See, e.g.*, *R. Mayer*, 158 F.3d at 546.[10]

Second, although petitioners attempt to parse the specific language of subsection (c)(2)(A)'s exemption in one respect, speculating about Congress' use of the phrase "safety regulatory authority," they fail to comment on the fact that the limited exemption from preemption for the States is articulated in terms of regulating "motor vehicles," not "motor carriers" or "tow truck[s]," as is the case elsewhere in subsection (c)(2). Thus the desired exemption for municipal authority that petitioners seek to import into the statute would be much broader than they have suggested.

Third, the reading urged by petitioners "would lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *See, e.g.*, *Tocher*, 219 F.3d at 1051. As noted above, however, there are especially good reasons for Congress to take this course where, as in this legislation, it is consciously seeking to implement an explicit program of deregulation.

Fourth, it would be particularly odd to conclude that Congress expressly intended to preserve municipal authority to regulate towing operations through the nonspecific language in subsection (c)(2)(A) when it used highly specific language to do

---

[10] *See also* H.R. Conf. Rep. No. 103-677, at 87 (1995), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 ("The conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.").

so with respect to municipal authority to regulate the *price* of *nonconsensual* "for-hire motor vehicle transportation by a tow truck" in subsection (c)(2)(C).[11]

Thus nothing in the decision below is inconsistent with this Court's settled preemption jurisprudence. At most, therefore, petitioners are simply dissatisfied with how the court of appeals applied those established standards on the facts of this case. The court below did not err in this respect, as explained above, but in any event the issue of whether the court misapplied the proper legal standards is not worthy of plenary review here.

---

[11] The House Committee Report's telling explanation of this provision in subsection (c)(2)(C) stated:

> This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and is not intended to permit re-regulation of any other aspect of tow truck operations.
>
> The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.

H.R. Rep. No. 104-311, at 121 (1995), *reprinted in* 1994 U.S.C.C.A.N. 793, 831-32.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

November 2001

Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street, Suite 200
Columbus, Ohio 43215

JEFFREY S. SUTTON
Counsel of Record
TRACI JONES LOVITT
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Ace Automobile Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999) ..... *passim*
Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) 4
Michigan Trucking Ass'n v. Michigan Pub. Serv. Comm'n, 571 N.W.2d 734 (Mich. Ct. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998) 5, 6
Ours Garage and Wrecker Service v. City of Columbus, No. 00-3409 (6th Cir. June 19, 2001) 7
People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870 (Cal. Ct. App. 2001), *review denied*, No. S0995954 (Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336) 2, 3, 6, 7
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) . 3, 7
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) 8, 10
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir. 2001) ..... *passim*
Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001) 3, 8, 9
Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 1

TABLE OF AUTHORITIES (cont'd)

Page

Docketed Cases

Ace Automobile Body & Towing Ltd. v. City of New York, No. 99-3 (filed July 23, 1999) 10
City of Santa Ana v. Tocher, No. 00-916 (filed Nov. 29, 2000) 9

Statutes

49 U.S.C. § 14501(c)(1) ..... *passim*
49 U.S.C. § 14501(c)(2)(A) ..... *passim*
49 U.S.C. § 14501(c)(2)(C) 5

Miscellaneous Authorities

Columbus City Code § 549.02 7
Columbus City Code § 549.07 7

REPLY BRIEF FOR PETITIONER

In its petition, the City of Columbus showed that this case satisfies the customary explanations for granting review. It squarely raises a recurring federal question—whether 49 U.S.C. § 14501(c)(2)(A) allows States to delegate safety enforcement or regulatory authority to municipalities regarding the use of tow trucks within their city limits. It presents an opportunity to resolve a mature and ongoing division of lower-court authority that now involves five federal courts of appeal. It concerns a conflict that not only has divided the federal courts of appeal but also has generated conflicts between state and federal courts *within the same geographic jurisdictions* (Michigan and California). It relates to an essential public-safety issue that virtually every major city in the country has attempted to address through regulations akin to those challenged here. And it concerns a lower-court decision that fails to follow the analytical path marked by *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and more generally fails to adhere to this Court's traditional interpretive rules.

Since the petition was filed, eight States (including California, Florida and Texas) and the International Municipal Lawyers Association (along with several cities) have filed *amici curiae* briefs that support each of these points and more. As the State *amici* brief (Br. 1, 7-8) confirms, "[a]ll States delegate considerable police power authority to cities, counties, and municipal associations" and thus "only a clear congressional directive can override the presumption in favor of leaving to the States the decision whether and how to delegate reserved police powers." The municipality *amici* brief (Br. 3-5) adds, "the tow truck business has traditionally and for many years been regulated solely on a local basis," where cities not only have long been "local respositories of the states' regulatory authority," but also have made up "92% of the 'safety regulatory authority' of the states."

In their brief in opposition to the petition, respondents understandably take a different tack. But, in doing so, they do not contest the importance of the question presented or the significance of the inter-circuit conflict. They instead attempt to gloss over this division by claiming that there is no "practical" conflict among the courts of appeal (Opp. 1). According to respondents, all courts have held that regulations governing the safety of *nonconsensual* towing operations are not preempted by 49 U.S.C. § 14501(c)(1) but that regulations governing *consensual* towing services are preempted (Opp. 6-9). Respondents' argument concerning nonconsensual tows is a red herring, while their assessment of the lower courts' treatment of consensual towing regulations is simply wrong. No less fundamentally, respondents' contention ignores the position of the national Towing and Recovery Association, the parent organization of one of the respondents here, which took exactly the opposite position two years ago in recommending that the Court grant review of the Second Circuit's decision in *Ace Auto Body*. The issue deserves the Court's time and attention.

1. At no point do respondents raise, or even hint at, a procedural obstacle to reviewing the question presented. No jurisdictional impediments exist, a final appealable order is in place, and there is no independent and adequate state ground precluding review. Nor do respondents argue that any of the City's arguments have been waived or otherwise lost.

2. Respondents also conspicuously fail to dispute the argument raised in the petition (Pet. 14-15), and seconded in the two *amici* briefs, that this federal issue is an important one. Whether one considers the vantage point of States or cities, large cities or small ones, federal courts or state courts, all have a stake in the issue, and all stand to benefit from guidance regarding its appropriate resolution. As reflected, moreover, by the certiorari petition filed in ***People ex rel. Renne v. Servantes***, 103 Cal. Rptr. 2d 870 (Cal. Ct.

App. 2001), ***review denied***, No. S0995954 (Cal. May 16, 2001), ***petition for cert. filed***, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336), and as reflected by the certiorari petition and *amici* brief filed in ***Ace Auto Body & Towing Ltd. v. City of New York***, 171 F.3d 765 (2d Cir.), ***cert. denied***, 528 U.S. 868 (1999), the tow-truck industry itself has an interest in resolving the question at hand.

3. Respondents also do not, and cannot, deny that the courts of appeal and state courts have issued conflicting decisions about whether municipalities may promulgate or enforce safety regulations under 49 U.S.C. § 14501(c)(2)(A). Several lower courts (including many of the courts on which respondents rely) have expressly acknowledged a conflict over the question presented and explicitly rejected the analysis of opposing courts. The Fifth Circuit, for example, recognized in ***Stucky v. City of San Antonio***, that "[t]he Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits have each held that § 14501(c)(2)(A) does not exempt municipal ordinances from the general preemptive reach of § 14501(c)(1). However, the Second Circuit and several district courts in this circuit have come to the *opposite* conclusion, finding that § 14501(c)(2)(A) explicitly exempts safety-focused municipal towing ordinances from § 14501(c)(1)." 260 F.3d 424, 439-40 (5th Cir. 2001) (internal citations omitted and emphasis added). Similarly, the California Court of Appeals has acknowledged that, "[w]ith respect to municipal ordinances, as distinct from state statutes, the existing case law is divided." ***People ex rel. Renne v. Servantes***, 103 Cal. Rptr. 2d at 879. Other courts have made the same observation. ***See Petrey v. City of Toledo***, 246 F.3d 548, 560 (6th Cir. 2001); ***Tocher v. City of Santa Ana***, 219 F.3d 1040,1050-51 (9th Cir. 2000); ***Ace Auto Body & Towing, Ltd. v. City of New York***, 171 F.3d at 775.

4. Instead of challenging the petition on these grounds, respondents primarily oppose review on the theory (Opp. 1) that no "practical" split exists. In their view, all courts allow

municipal regulation of ***nonconsensual*** towing by exempting these regulations from preemption under either 49 U.S.C. § 14501(c)(2)(A) or the "municipal proprietor" exception to preemption, which allows municipalities to regulate conduct when they purchase towing services themselves. ***See Bldg. & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.***, 507 U.S. 218, 226-29 (1993). And all courts, they then attempt to show, agree that ***consensual*** regulations like those here are preempted under § 14501(c)(1). While respondents are correct that the lower courts' results are consistent when it comes to the regulation of towing services ***purchased*** by municipalities (usually called ***nonconsensual*** towing services), they err in contending that this agreement has any meaningful application to the division in lower-court authority over ***consensual*** towing regulations.

a. The City of Columbus agrees with respondents' contention that, under the municipal proprietor exception, cities retain authority to impose standards and regulations regarding the towing services that they ***purchase***. But that truth does not answer the question whether safety regulations governing ***consensual*** tows are exempt from preemption under § 14501(c)(2)(A), and more essentially whether a lower-court split exists over this issue.

b. The City of Columbus does not agree with respondents' contention (Opp. 1-2) that "no court" has ruled that the local regulation of consensual towing operations is exempt from preemption under § 14501(c)(2)(A). As even a cursory reading of the Second Circuit's opinion in ***Ace Auto*** and the Fifth Circuit's decision in ***Stucky*** makes clear, an express conflict among the courts of appeal has developed concerning the ability of municipalities to promulgate and enforce such regulations. In both ***Ace Auto*** and ***Stucky***, the parties asked the circuit courts to decide the validity of city ordinances that prohibited tow trucks from removing disabled vehicles unless they were summoned by the police (or other specified local

government officials), ***not by the vehicle's owner***. Both ordinances thus regulated ***consent*** tows by purporting to prohibit vehicle owners from hiring a tow truck on their own at an accident scene. The Second Circuit upheld the ordinance because the city had merely exercised the safety regulatory authority delegated to it by the State of New York. The Fifth Circuit, however, reached the opposite result. It concluded that the ordinance did not authorize ***any*** municipal regulation of towing, whether consensual or nonconsensual. Nor was it willing to save the ordinance under the municipal proprietor exception because, when a police officer denies a vehicle owner a choice of tow trucks, the court concluded that he acts like a regulator, not a market participant. ***See Stucky***, 260 F.3d at 434-39 & n.11.

The Second and Fifth Circuits only appear to be considering different types of towing regulations because they use the terms "consensual" and "nonconsensual" differently, a difference that is not relevant to the question at hand but rather concerns the scope of the municipal proprietor exception and § 14501(c)(2)(C). The Second Circuit defined "nonconsensual" tows broadly as "any tow performed without the prior consent or authorization of the owner or operator of the motor vehicle, regardless of the reason for the lack of consent." ***See Ace Auto Body***, 171 F.3d at 777-78 (internal quotations and citation omitted). The Fifth Circuit, however, rejected this definition and held that "nonconsensual" tows are "true nonconsent tows," where the owner of the vehicle is unknown, unavailable, or so badly injured in an accident that he cannot choose a towing company. ***Stucky***, 260 F.3d at 434-35. This difference in nomenclature does not alter the bottom-line difference in outcome regarding the validity of two virtually identical towing regulations. In the last analysis, even the most discriminating dissection of the federal appellate decisions cannot counter this essential point: Five federal courts of appeal have reached different results in assessing the validity of similar towing regulations.

5. Also unpersuasive are respondents' attempts (Opp. 9-12) to distinguish *Michigan Trucking Ass'n v. Michigan Public Service Comm'n*, 571 N.W.2d 734 (Mich. Ct. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998), and *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). They argue that *Michigan Trucking* is inapposite because it concerned a safety rating system, not towing regulations, and an action by the Michigan Public Service Commission ("MPSC"), not a local government. But these are quintessential distinctions without difference. By upholding the MPSC's safety rules, the Michigan court held that States may delegate their authority to promulgate regulations under § 14501(c)(2)(A) to other governmental agencies created by the State. This holding directly conflicts with the decisions of the Fifth, Sixth, Ninth and Eleventh Circuits, all of which have held that § 14501(c)(2)(A) does not allow such a delegation. Indeed, had the Sixth Circuit embraced this view, it would have led to a different result in this case.

Respondents' effort to distinguish *Servantes* also comes up short. In arguing that the California Court of Appeals' analysis concerning § 14501(c)(2)(A) was *dicta*, respondents get the issue exactly backwards. The court's only *dicta* related to the secondary state law issues that respondents wrongly promote to a holding; in the court's final summation of the decision, it properly characterized its conclusion as relating precisely to the matter on which certiorari is being sought here. *See Servantes*, 103 Cal. Rptr. 2d at 880 ("In summary, we conclude that when, as here, the state has delegated authority to local authorities . . . , the municipal regulations on safety issues fall within the exception of [14501(c)(2)(A)] and are not preempted.") (internal citation omitted).

6. Respondents further err (Opp. 8-9) in suggesting that consensual tows do not implicate core safety issues. In truth, most accidents result in *consensual* tows because the vehicle owners usually remain capable of hiring towing services after the accident. *See Stucky*, 260 F.3d at 435, 436, 437 & n.14. Accordingly, in jurisdictions where municipalities may not regulate the safety of consensual tows, tow trucks will continue to race to accident scenes motivated by the enterprising hope of persuading, or coercing, vehicle owners to accept their services.

Similar public-safety issues also arise in the context of non-accident consensual tows, which occur when a car breaks down late at night and the owner calls a towing company to move the vehicle. As the California Court of Appeals has explained, the acts of getting into a tow truck with a stranger and of driving to the desolate, unsafe and poorly-lit areas where towed cars tend to be stored present acute safety concerns. And it blinks at reality to trivialize these concerns. *See Servantes*, 103 Cal. Rptr. 2d at 878. In point of fact, Columbus attempted to address these safety problems by prohibiting towing without a license and by allowing the City to revoke the license of any operator who lacks "good moral character." *See* Columbus City Code § 549.02, 549.07; Pet. App. 37-A, 40-A. Under the law of the Sixth Circuit, to say nothing of the Fifth, Ninth and Eleventh Circuits, such eminently-sensible regulations are preempted and, as these courts have held, may *not* be saved by the municipal proprietor exception. *See Ours Garage and Wrecker Service v. City of Columbus*, No. 00-3409 (6th Cir. June 19, 2001); Pet. App. 2-A; *Petrey v. City of Toledo*, 246 F.3d 548, 559-63 (6th Cir. 2001).

7. Respondents offer only a tepid defense of the lower-court decision—so tepid in fact that they nowhere explain how their interpretation makes sense of the references to "enact" or "enforce" in § 14501(c)(1). As explained in the petition

(Pet. 17-20), the preemption provision says that "a State, political subdivision of a State, or political authority of 2 or more States may not ***enact or enforce*** a law, regulation, or other provision" relating to towing. 49 U.S.C. § 14501(c)(1) (emphasis added). The safety exemption, however, says that the preemption provision "shall not restrict the ***safety regulatory authority of the State*** with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphasis added). The language of the two provisions thus demonstrates that the term "safety regulatory authority" is a term of art encompassing the State's ability both to enact and enforce laws and to delegate this authority to local governments or state agencies. Any other interpretation of the safety exemption would make the State powerless to pass safety laws, then delegate their ***enforcement*** to local police (Pet. 20)—a development that would come as news to every state legislature and governor in the country.

8. Also meritless is respondents' suggestion (Opp. 17) that this decision does not deserve review because the Court has rejected three petitions concerning this question before. (Citing ***Ace Auto Body & Towing Ltd. v. City of New York***, 171 F.3d 765 (2d Cir.), ***cert. denied***, 528 U.S. 868 (1999); ***R. Mayer of Atlanta, Inc. v. City of Atlanta***, 158 F.3d 538 (11th Cir. 1998), ***cert. denied***, 526 U.S. 1038 (1999); ***Tocher v. City of Santa Ana***, 219 F.3d 1040 (9th Cir. 2000), ***cert. denied***, 121 S. Ct. 1085 (2001)) In addition to the sheer speculativeness of this contention, respondents make two fundamental mistakes in pressing the point.

To begin, the life cycle of nearly every federal question that makes its way to the Court reveals a pattern of early denials of review followed by a grant of certiorari. Respondents' contention thus merely illustrates the difference between undeveloped divisions of authority, which often evade review, and mature divisions of authority, which often do not.

A review of the earlier petitions confirms this truth and one other relevant point as well. When the ***Ace Auto*** petition was initially filed, no conflict among the circuits existed, and when the ***Mayer*** petition was filed, the conflict was still nascent. The more recent denial of review in ***Tocher*** earlier this year has even less relevance. The ***Tocher*** question presented did ***not*** raise the statutory preemption issue raised here, but rather asked the Court to consider whether the Ninth Circuit's decision was "[c]onsistent with the limitations of the ***Commerce Clause.***" ***See*** Petition of Santa Ana, Calif. in ***City of Santa Ana v. Tocher***, No. 00-916 at i (Nov. 29, 2000).

In marked contrast to these earlier cases, this petition squarely presents the question that has divided the lower courts and does so after five circuit courts and two state courts have attempted to resolve the issue. Respondents do not dispute that the Columbus ordinances invalidated by the Sixth Circuit amount to safety regulations that would otherwise fall under § 14501(c)(2)(A), and they fail to identify any meaningful vehicle problem that would prevent the Court from deciding the question. The only complaint they have registered regarding the utility of reviewing this case is the brevity of the Sixth Circuit's decision. But appellate decisions that turn on prior circuit authority, as this one did, necessarily will be short. That brevity, at any rate, helpfully confirms that in the eyes of the lower court this case turned on an interpretation of law, not on the idiosyncracies of a given municipal regulation or a given fact pattern.

9. All of this is prelude, however, to a final reason for granting the writ, and one confirmed by a review of the prior certiorari petitions filed on this issue. Two years ago, the leading national towing-services organization took the same view of the issue that the City of Columbus has—namely, that review is warranted.

In ***Ace Auto Body***, the Towing and Recovery Association of America, which is "a federation of fifty state towing and

recovery associations," filed an *amici curiae* brief at the certiorari stage. *See* Br. of *Amici Curiae* of the Towing and Recovery Association of America and the United Motorcoach Association in support of the Petition for Certiorari in ***Ace Auto Body & Towing Ltd. v. City of New York***, No. 99-3, at 2 (filed July 23, 1999) ("*Ace Auto Amici* Br."). One of the respondents in this case, the Towing and Recovery Association of Ohio, is an affiliated state association of this national organization. *See* http://www.towserver.com/State%20 Associations.htm. And the other respondent, Ours Garage and Wrecker Service, Inc., is a member of the respondent state association. *See* http://www.trao.org/ memberlist.php3. Thus, at least one respondent (and arguably both respondents) are affiliated with the Towing and Recovery Association of America. In its brief to the Court two years ago, the national association in no uncertain terms described the debate about the meaning of § 14501(c)(2)(A) as raising a "fundamental question concerning what, if any, regulatory authority Congress intended to reserve for States and political subdivisions," *Ace Auto Amici* Br. at 3, and acknowledged that the "Second Circuit's reading of 49 U.S.C. § 14501(c)(2)(A) conflicts *directly* with the Eleventh Circuit's decision in [*Mayer*]," *id.* at 4-5 (internal citation omitted and emphasis added). The association failed to make any distinction between nonconsensual and consensual tows. Quite to the contrary: ***It specifically identified the Columbus ordinance at issue here, Chapter 549 of the Columbus City Code,*** as similar to the Atlanta and New York City requirements considered in *Mayer* and *Ace Auto* and representative of towing safety requirements across the country. *See id.* at 15-16. What was true two years ago has become all the more true today: The issue warrants review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street
Suite 200
Columbus, Ohio 43215

November 2001

JEFFREY S. SUTTON
Counsel of Record
TRACI JONES LOVITT
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

Supreme Court, U.S.
FILED
DEC 19 2002
CLERK

No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN, and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

TABLE OF AUTHORITIES

PAGE

Cases

Black v. Cutter Labs., 351 U.S. 292 (1956) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted) 4, 5
California v. Rooney, 483 U.S. 307 (1987) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted) 5, 6
Florida v. Casal, 462 U.S. 637 (1983) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted) 5
Montana v. Imlay, 506 U.S. 5 (1992) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted) 5
People ex rel. Renne v. Servantes, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (Cal. App. 1st Dist. 2001) (certified for partial publication; portion so certified), *review denied*, No. S095954 (Cal. May 16, 2001), *cert. pending* (Case No. 01-336) 2, 3
People ex rel. Renne v. Servantes, No. A089493 (Cal. Ct. App. 1st Dist. Feb. 1, 2001) (certified for partial publication; portion not certified), *review denied*, No. S095954 (Cal. May 16, 2001), *cert. pending* (Case No. 01-336) ..... *passim*

Statutes and Rules

S. Ct. R. 15.8 1
49 U.S.C. § 14501(c) ..... *passim*
Cal. Bus. & Prof. Code § 17200 *et seq.* 2, 3
Cal. Veh. Code § 22658 3

No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN,
and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and
THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENTAL BRIEF FOR RESPONDENTS

This brief is being filed pursuant to S. Ct. R. 15.8, in order to call the Court's attention to "intervening matter[s] not available at the time of [respondents'] last filing." *Id.* Those intervening matters include: (i) correspondence subsequently filed in *Servantes v. Renne*, Case No. 01-336; and (ii) the full opinion by the California Court of Appeal in that case (including the remaining sections not certified for publication), which was submitted with the correspondence and not previously available to respondents in this case. As discussed below, these matters bear directly on the proper disposition of the petition in this case, which originally was scheduled for disposition at the Court's conference on November 30 but apparently was then deferred for consideration along with the *Servantes* petition.

BEST AVAILABLE COPY

1. In the *Servantes* case, respondent City and County of San Francisco has now indicated that it "supports the petition for writ of certiorari" in that case for two reasons. First, it alleges that "the California Court of Appeal [is] in conflict" with the Ninth Circuit and others on "the preemptive reach" of 49 U.S.C. § 14501(c). Letter from Louise H. Renne, City Attorney, to William K. Suter, Clerk of the Court 1 (Nov. 19, 2001). As respondents explained in their brief in opposition filed in this case, the lower court ruling in *Servantes* creates *no* conflict with any other court because it rests on *not one but two* adequate and independent state grounds that would necessitate affirmance in any event. *See* Opp. 10-12 (lower court expressly stated that Servantes' violations of *municipal* towing regulations were redundant of his violations of *state* towing regulations, and that his violations of California's Unfair Competition Act were fully supported by his "unfair business practices" quite apart from whether he had violated *either* state or municipal towing regulations) (quoting *Servantes*, 103 Cal. Rptr. 2d at 881).[1]

Respondent in *Servantes* has now submitted the complete opinion by the California Court of Appeal, including those portions not certified for-publication, which were not previously available to respondents in this case and which further support the conclusion that the court's holding rests on adequate and independent state grounds.

As respondents in this case had pointed out, *see* Opp. 11, the California Court of Appeal had noted in *Servantes* that it was unnecessary to base its ruling on its conclusion that *municipal* towing regulations were not preempted because the same result and all of the same penalties would be fully

[1] Moreover, the papers filed in the *Servantes* case contain no discussion of the important distinction between municipal regulation of *consensual* towing operations and municipal regulation of *nonconsensual* towing operations, which, as respondents in this case have explained, serves to reconcile the lower court decisions that are purported to be in conflict with one another. *See* Opp. 6-16.

sustained on the basis of "Servantes' violations of *state* law, specifically Vehicle Code section 22658." 103 Cal. Rptr. 2d at 881 (emphasis added). This sufficient basis for the court's judgment is bolstered by its further discussion in unpublished part IV of its opinion, where it addresses the sufficiency of the evidence to support the trial court's findings. In this portion of its opinion, the Court of Appeal rests explicitly on the fact that "the trial court based its judgment on Servantes' violations of Vehicle Code 22658," which again are the *state* towing laws. *People ex rel. Renne v. Servantes*, No. A089493, at 16 (Cal. Ct. App. 1st Dist. Feb. 1, 2001) (certified for partial publication; portion not certified), *review denied*, No. S095954 (Cal. May 16, 2001), *cert. pending* (Case No. 01-336). Its examination of the underlying evidence is aimed solely at supporting the trial court's findings that Servantes violated those state regulations on 747 separate occasions. *See id.* at 16-18.[2] In turn, those same 747 violations of *state* towing laws are used in the next unpublished portion of the Court of Appeal's opinion (part V) as the entire basis for upholding the fines imposed under California's Unfair Competition Act. *See id.* at 19-20.

Finally, in the last unpublished portion of its opinion (part VI), the court addressed Servantes' claim that the injunction "prohibiting him from all private property towing in the State of California" was overbroad because the trial court "had no authority to govern his activities outside San Francisco." *Id.* at 20. The Court of Appeal again rejected this claim because he had violated not only municipal towing laws, but also state laws:

> First, Servantes's misconduct constituted violations of state law (Veh. Code, § 22658; Bus. & Prof. Code, § 17200 et seq.). Hence, his reliance on the principle that municipal towing regulations must be confined to

[2] The only mention of any municipal towing laws in this passage is to reinforce an inference of certain additional documentary evidence on one point in order to support the overall sufficiency of the evidence that the state towing laws were repeatedly violated. *See id.* at 17.

> businesses within the local jurisdiction (Veh. Code, § 21100, subd. (g)) is unavailing. The power of the court to enforce state law is not limited by the regulatory effect of the San Francisco ordinance.

Id. at 21. Here again, therefore, the court emphasized that its decision was satisfactorily premised on Servantes' violations of state towing laws without regard to his further violations of municipal towing laws.[3]

The fact that respondent in *Servantes* never sees fit to discuss or even mention the issue of adequate and independent state grounds in its letter filing is unfortunate but irrelevant to this Court's determination of whether that ruling rests on alternative grounds that eliminate any direct conflict with other lower court rulings. Indeed, in *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) (per curiam), the Court found it necessary to dismiss the case after oral argument without deciding the merits because it found that the ruling below – though it had addressed important federal constitutional issues under the Due Process and Equal Protection Clauses – actually was supported also by the California state court's rulings on other points of local law. The Court's discussion in *Black* is equally applicable here:

> At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. *In such a case, it is our duty to* look beyond the broad sweep of the language and *determine for ourselves precisely the ground on which*

[3] Accordingly, the *Servantes* case does not raise any justiciable issue about the proper application of 49 U.S.C. § 14501(c)(2)(A) to municipal towing regulations and does not conflict with the ruling below in this case. If instead the more extreme claim being made is that *all* state laws of general application (such as antitrust and competition constraints, commercial regulations, trespass laws, and the like) are simply preempted by 49 U.S.C. § 14501(c)(1) as applied to tow-truck operations, then this sweeping claim does not merit review because it implicates no split of authority in the lower courts.

> *the judgment rests*. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

Id. at 298 (emphasis added).[4] *See also Montana v. Imlay*, 506 U.S. 5 (1992) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted); *id.* at 506 (Stevens, J., concurring) ("Thus, no matter which party might prevail in this Court, the [result imposed] will be the same. . . . except, of course, from the potential benefit that might flow from an advisory opinion."); *Florida v. Casal*, 462 U.S. 637 (1983) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted where decision below rested on adequate and independent state grounds).

2. In addition, the *Servantes* respondent "supports the petition for writ of certiorari" in that case because, "although the appellate court reached the correct result, San Francisco disagrees with a portion of its analysis." Renne Letter at 1. That, of course, is not a proper basis for seeking or obtaining plenary review from this Court, which "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (dismissing the writ of certiorari after oral argument as improvidently granted) (quotation omitted). As the Court aptly explained in *Rooney*, the mere fact that the prevailing party below was not satisfied with the niceties of the lower court's analysis does not give it any claim on the limited resources of this Court: "Here, the judgment of the Court of Appeal was entirely in the State's favor . . . . The fact that the Court of Appeal reached its decision through analysis different

[4] Respondent in *Servantes* apparently did not respond to the petition for review filed in the California Supreme Court. Thus, it is entirely plausible – though impossible to know for certain – that the highest state court itself declined to review the issues raised because the Court of Appeal had identified two alternative grounds for its decision, thus rendering any opinion on these issues purely advisory in nature.

than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request us to review it." *Id.*

Moreover, the "portion of its analysis" that the *Servantes* respondent apparently disagrees with is entirely irrelevant to any of the issues that have ever been alleged to merit this Court's review. The *Servantes* respondent claims that the lower court "should have concluded that" 49 U.S.C. § 14501(c) "does not generally preempt . . . state and local towing laws" and thus the safety exception contained in 49 U.S.C. § 14501(c)(2)(A) should never have come into play. Renne Letter at 2. That suggestion is utterly untenable and has been uniformly rejected by the dozens of courts that have considered these statutory issues. It cannot be squared either with the plain fact that a tow truck is a "motor carrier" engaged in "the transportation of property" as defined in subsection (c)(1) or with Congress's own recognition that tow trucks are encompassed within the statute when it enacted a specific exception to preemption limited only to regulations "relating to the price of for-hire [nonconsensual] motor vehicle transportation by a tow truck" in subsection (c)(2)(C). No conflict exists that merits review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied in this case and in *Servantes*, Case No. 01-336.

Respectfully submitted,

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

December 2001

Supreme Court, U.S.
FILED
NOV 6 2001
OFFICE OF THE CLERK

(5)

No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI* STATES IN SUPPORT OF PETITIONERS

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed After Conclusion]

16 pp

QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 2

I. THERE IS A DEEPENING SPLIT OF AUTHORITY ON THE IMPORTANT AND RECURRING FEDERAL QUESTION RAISED IN THIS CASE ... 2

II. THE SIXTH CIRCUITS DECISION UNDERMINES THE PREMISE OF STATE CONSTITUTIONAL AND STATUTORY PROVISIONS THAT ASSUME THE STATES HAVE THE POWER TO DELEGATE RESERVED POLICE POWER AUTHORITY IN THE MANNER THEY DEEM MOST APPROPRIATE 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999) 2, 3, 4
California v. ARC Am. Corp., 490 U.S. 93 (1989) 8
District of Columbia v. *John R.Thompson Co.*, 364 U.S. 100 (1953) 7
Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937) 8
Mayor v. Educ. Equal. League, 415 U.S. 605 (1974) 8
Michigan Trucking Assn v. Michigan Public Service Comm'n, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998) 4
People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *review denied* (May 16, 2001) 4
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) . 2, 5
Pittman v. Chicago Bd. of Educ., 64 F.3d 1098 (7th Cir. 1995) 8
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999) 2, 5
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) ... 8
Russello v. United States, 464 U.S. 16 (1983) 5
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir. 2001) 2, 6
Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001) 4, 6
Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) . 1, 3

Constitutional Provisions and Statutes

49 U.S.C. § 14501(c) 2, 3, 4, 5
Alaska Const. art. X, § 11 7

TABLE OF AUTHORITIES
(Continued)

Page

Ariz. Const. art. XIII, § 2 7
Cal. Const. art XI, § 7 7
Colo. Const. art. XX, § 6 7
Fla. Const. art. VIII, § 2 7
Haw. Const. art. VIII, § 2 7
Idaho Const. art. XII, § 2 7
Iowa Const. art. III, § 38A 7
Kan. Const. art. 12, §5 7
La. Const. art. 6, § 5 7
Mass. Const. Ann. Amend. art. II, § 6 7
Mich. Const. art. VII, § 21 7
Mo. Const. art. 6, § 19 7
Mont. Const. art. XI, §6 7
Neb. Const. art. XI, §§ 2-4 7
N.M. Const. art. X, § 6 7
N.Y. Const. art. IX, § 2 7
N.C. Const. art. VII, §1 7
Ohio Const. art. XVIII, §3 7
Okla. Const. art. XVIII, § 3A 7
Or. Const. art XI, § 2 7
Pa. Const. art. 9, § 2 7
R.I. Const. art. XIII, § 2 7
S.C. Const. art. VIII, § 17 7
S.D. Const. art. IX, §2 7
Tenn. Const. art. XI, § 9 7
Tex. Const. art. XI, § 5 7
Utah Const. art. XI, §5 7
Wash. Const. art. XI, §11 7
W. Va. Const. art. VI, § 39 8
Wis. Const. art. XI, § 3 8
Wyo. Const. art. 13, §1 8
Ala. Code §11-45-1 (1975) 7
Del. Code. Ann. tit. 22, § 802 (2000) 7

TABLE OF AUTHORITIES
(Continued)

Page

Minn. Stat. § 410.04 (2000) 7
N.J. Stat. § 40:69A-30 (2001) 7

INTERESTS OF THE *AMICI*

The States have a substantial interest in the question presented in this case. The Sixth Circuit's decision effectively holds that the States may not delegate their general police power authority to units of local government which are, after all, subdivisions of the State.

All States delegate considerable police power authority to cities, counties, and municipal associations, including responsibility over public safety issues on local streets and roads. And all States have constitutional and statutory provisions addressing and providing for such delegations of the States' police power authority. Neither the Constitution nor federal statutes dictate how the States exercise their reserved police powers, nor should federal law do so.

The Sixth Circuit's reading of the federal statutory phrase "safety regulatory authority of a State" as not permitting the States the discretion to determine how to exercise that authority—including the option of delegating to local government units—runs directly contrary to the longstanding assumption that the States do have precisely such discretion.

This Court has recognized the general rule that a reservation of regulatory authority for the States in a federal statute that might otherwise preempt state regulation "leaves the allocation of regulatory authority to the 'absolute discretion' of States themselves, including the option of leaving local regulation . . . in the hands of local authorities." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 608 (1991).

The States have a substantial interest in the proper resolution of the important and recurring federal question that is presented in the petition. That issue has sharply divided the lower federal and state courts. This Court should grant review.

STATEMENT OF THE CASE

The *amici* States adopt by reference the petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPENING SPLIT OF AUTHORITY ON THE IMPORTANT AND RECURRING FEDERAL QUESTION RAISED IN THIS CASE.

As amply demonstrated in the petition, there currently are at least four Circuits, including the Sixth Circuit in this case, that have concluded that the States in fact do not have the discretion to delegate the police power reserved to them under 49 U.S.C. § 14501(c)(2)(A). *See Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001); *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999).

But the Second Circuit and the California Court of Appeals have reached a contrary (and the correct) conclusion, holding that the States do retain such authority. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999); *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *review denied* (May 16, 2001).

This deepening split of authority on an important and recurring federal issue that is of great practical significance to the States and local government bodies merits plenary review at this time.

On one side of this issue, the Second Circuit and several state courts have upheld local safety ordinances like the one at issue here. In *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999), the Second Circuit acknowledged that political

subdivisions are not mentioned in the safety exemption (§ 14501(c)(2)(A)).

But the court correctly reasoned that, although "the text of § 14501(c)(2)(A), unlike the other subsections of § 14501, fails to preserve explicitly the regulatory authority of the political subdivision of the state," that is "no reason to construe" the language of § 14501(c)(2)(A) "to prevent the state from delegating *its* regulatory authority to a municipality." *Ace Auto*, 171 F.3d at 775.

In reaching that conclusion, the Second Circuit relied upon the Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991), which addressed a similar issue in the context of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). That statute, the Second Circuit noted, expressly permits only "States" to regulate pesticides, but the Court nonetheless held that the most "plausible reading of FIFRA's authorization to the States leaves the *allocation* of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Ace Auto*, 171 F.3d at 775-776 (emphasis added) (quoting *Mortier*, 501 U.S. at 608).

As more fully explained in *Mortier*:

> The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" . . . in [its] absolute discretion.'" * * * The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" *because political subdivisions are components of the very entity the statute empowers*.

501 U.S. at 607-08 (emphasis added) (internal citations omitted).

Because *Mortier* concluded that FIFRA permits the States to delegate authority to political subdivisions even though the relevant federal statute does not expressly mention such local government entities, the Second Circuit reasoned that it is appropriate to read section 14501(c)(2)(A) to permit such a delegation here. *Ace Auto*, 171 F.3d at 775-76.

Like the Second Circuit, the California Court of Appeals has held that section 14501(c) generally does not preempt local tow truck ordinances. "Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress." *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001).

The Michigan Court of Appeals reached a similar result in *Michigan Trucking Ass'n v. Michigan Public Service Commission*, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998). In that case, the issue was whether a State could delegate its safety authority to a state agency (the Michigan Public Service Commission) to develop and implement a "motor carrier safety rating system." *Id.* at 735. The court found no preemption because the rules were "promulgated by the PSC pursuant to its authority from the Legislature." *Id.* at 737.

On the other side of the issue, the Sixth Circuit's reasoning is representative of those courts which have held that 49 U.S.C. § 14501(c)(2)(A) does not permit the States the discretion to delegate their reserved police power authority over tow truck operations. In its recent decision in *Petrey* (the case upon which the Sixth Circuit relied in rejecting the City's claim in this case), the court focused on the fact that the general preemption provision (section 14501(c)(1)) applies to "a State, political subdivision of a State, or political authority

of 2 or more States," while the safety exemption (in section 14501(c)(2)(A)) applies just to "the safety regulatory authority of a State."

Relying on the canon of construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983), the court concluded that the omission of a reference to cities in the safety exemption meant that "while states may regulate the safety of motor carriers, political subdivisions may not." *Petrey*, 246 F.3d at 561.

The Ninth and Eleventh Circuits previously reached the same conclusion. In *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 153 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999), tow truck companies objected to several ordinances adopted by Atlanta dealing with "consensual tows"—that is, tows "which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 153 F.3d at 541.

Like the Sixth Circuit, the Eleventh Circuit applied the canon of construction that "when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Id.* at 545-46. Because only the words "a State" appear in § 14501(c)(2)(A), and not "a State or a political subdivision of a State" as in § 14501(c)(2)(C), the court concluded that this demonstrated congressional "intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1)." *Mayer*, 153 F.3d at 545-46.

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001), reached the same conclusion with respect to the tow truck ordinance at issue there, once again relying upon the *Russello* canon of construction.

Most recently, the Fifth Circuit sided with the Sixth, Ninth and Eleventh Circuits. In *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), the court addressed a "chasing" ordinance, much like the City of Columbus ordinance at issue here.

The Fifth Circuit acknowledged "the closeness of the issue and the soundness of the arguments on either side," 260 F.3d, at 440, as well as the division of opinion among the lower courts on this "difficult task of statutory interpretation." *Id.* at 442. Nonetheless, relying on the canon of construction that also persuaded the Sixth, Ninth and Eleventh Circuits, the Fifth Circuit concluded that the absence of a reference to political subdivisions in section 14501(c)(2)(A) demonstrated congressional intent that the safety exemption does not apply to local ordinances.

Ultimately, there is a growing and deepening division of authority in the lower federal and state courts on the issue presented in this case. One Circuit and two state courts have determined that section 14501(c) does not preempt local safety ordinances regulating tow truck operations. Four Circuits have reached the opposite conclusion, and have acknowledged the split of authority on the question.

Moreover, in two states (California and Michigan), the state courts and the federal Circuits that include those states have reached contrary conclusions regarding the preemptive scope of § 14501(c). For these reasons, this case merits the Court's plenary review.

II. THE SIXTH CIRCUIT'S DECISION UNDERMINES THE PREMISE OF STATE CONSTITUTIONAL AND STATUTORY PROVISIONS THAT ASSUME THE STATES HAVE THE POWER TO DELEGATE RESERVED POLICE POWER AUTHORITY IN THE MANNER THEY DEEM MOST APPROPRIATE.

A municipal corporation is a department of the state. For that reason, the state may "fashion its basic law so as to grant home rule or self-government to its municipal corporations." *District of Columbia v. John R. Thompson Co.*, 364 U.S. 100, 108 (1953).

In doing so, the state may give its municipalities as broad authority as the state itself possesses. *District of Columbia*, 364 U.S. at 108 ("the delegated power of municipalities is as broad as the police power of the state, except as may be restricted by terms of the grant or by the state constitution").

Most states have exercised this authority to grant local governments broad authority to regulate municipal affairs, including the adoption of local police power regulations, except where such regulations would conflict with the state's general law. *See, e.g.*, Ala. Code §11-45-1 (1975); Alaska Const. art. X, § 11; Ariz. Const. art. XIII, § 2; Cal. Const. art XI, § 7; Colo. Const. art. XX, § 6; Del. Code. Ann. tit. 22, § 802 (2000); Fla. Const. art. VIII, § 2; Haw. Const. Art. VIII, § 2; Idaho Const. art. XII, § 2; Iowa Const. art. III, § 38A; Kan. Const. art. 12, §5; La. Const. art. 6, § 5; Mass. Const. Ann. Amend. art. II, § 6; Mich. Const. art. VII, § 21; Minn. Stat. § 410.04 (2000); Mo. Const. art. 6, § 19; Mont. Const. art. XI, §6; Neb. Const. art. XI, §§ 2-4; N.J. Stat. § 40:69A-30 (2001); N.M. Const. art. X, § 6; N.Y. Const. art. IX, § 2; N.C. Const. art. VII, §1; Ohio Const. art. XVIII, §3; Okla. Const. art. XVIII, § 3A; Or. Const. art XI, § 2; Pa. Const. art. 9, § 2; R.I. Const. art. XIII, § 2; S.C. Const. art. VIII, § 17; S.D. Const. art. IX, §2; Tenn. Const. art. XI, § 9; Tex. Const. art. XI, § 5; Utah

Const. art. XI, §5; Wash. Const. art. XI, §11; W. Va. Const. art. VI, § 39; Wis. Const. art. XI, § 3; Wyo. Const. art. 13, §1.

It is beyond question that the Constitution generally does not dictate the form or structure of state and local governments, nor the allocation of state power between those entities. *See, e.g., Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1101 (7th Cir. 1995) (recognizing and citing numerous cases for "the principle that the federal Constitution does not prescribe any particular separation of powers, or other internal structure, of state government"); *see also Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Mayor v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental power"). Nor should federal statutes such as section 14501(c) be permitted to do so.

Indeed, in order to fully respect the States' interests in this respect, there should be a strong presumption that any federal statutory reservation of police power authority to a "State" or the "States" includes the discretion for the States to choose to delegate some of that authority to units of local government.

"When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Thus, only a clear congressional directive can override the presumption in favor of leaving to the States the decision whether and how to delegate reserved police powers. Section 14501(c)(2)(A) is not such a directive.

The consequence of the Sixth Circuit's decision is to force the States to enact safety regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets. As a matter of Federal-State comity, as the Court's clear pronouncement in *Mortier* demonstrates, federal courts should be reluctant to discern a congressional intent to undermine this traditional State power.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed Below]

November, 2001

BILL LOCKYER
Attorney General
State of California
1300 I Street
Suite 125
P.O. Box 944255
Sacramento, CA 94244

TOM WARNER
Solicitor General
Office of Attorney General
P.L. 01
The Capital
Tallahassee, FL 32399

MIKE MCGRATH
Attorney General of the State
of Montana
215 N. Sanders
P.O. Box 201401
Helena, MO 59620

JERMEY W. (JAY) NIXON
Attorney General of
Missouri
Supreme Court Building
207 W. High Street
Jefferson City, MS 65101

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105

MARK BARNETT
Attorney General
State of South Dakota
500 E. Capital Avenue
Pierre, SD 57501

JOHN CORNYN
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711

(6)

Supreme Court, U.S
FILED
NOV 6 2001
OFFICE OF THE CLERK

No. 01-419

In The

Supreme Court of the United States

CITY OF COLUMBUS, OHIO, et al.,

Petitioners,

vs.

OURS GARAGE and WRECKER SERVICE, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE*, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE CITY OF GARLAND, TEXAS, THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, AND THE CITY OF SAN JOSE, CALIFORNIA, IN SUPPORT OF PETITIONERS

CHARLES M. HINTON, JR.
City Attorney
Counsel of Record
BRAD NEIGHBOR
First Assistant City Attorney
City of Garland, Texas
P.O. Box 469002
Garland, Texas 75046-9002
(972) 205-2380
(972) 205-2389 [FAX]

HENRY W. UNDERHILL, JR.
General Counsel/ Executive Director
LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

(Additional Counsel Listed on Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14pp

LOUISE H. RENNE
City Attorney
ROSE-ELLEN HEINZ
Deputy City Attorney
OFFICE OF THE CITY ATTORNEY
City and County of San Francisco
1390 Market Street
6th Floor
San Francisco, CA 94102
(415) 554-3845

GEORGE RIOS
Assistant City Attorney
City of San Jose
151 W. Mission St.
San Jose, CA 95110
(408) 277-4454

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of the Argument 3

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 7

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 7

Northwest Airlines, Inc. v. Duncan, 531 U.S. 1058 (2000) (mem.) 8

People v. Servantes, 86 Cal. App. 4th 1081 (Cal. Ct. App. 2001), *review denied*, (Cal., May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336) 2

STATUTES:

49 U.S.C. §14501(c) ..... *passim*

RULES:

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES:

H.R. CONF. REP. NO. 103-677 (1994) 7

INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association ("IMLA") and the City of Garland, Texas, as *amici curiae*, file this brief in support of the Petitioners, the City of Columbus, Ohio, *et al.*[1]

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions,

---

[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici curiae* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and views of local governments on legal issues. IMLA has appeared as an *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The City of Garland, Texas is a home-rule municipality located in Dallas County, Texas. Any ruling on the reach of the preemptive effects of 49 U.S.C. §14501(c) will necessarily impact the City not only in the realm of tow truck regulation but in other as yet unanticipated areas that cities have traditionally regulated.

The City and County of San Francisco, California is a charter city located in California. The City and County of San Francisco sued a tow operator for unfair business practices based upon his violations of the California Vehicle Code and a local towing ordinance. *People v. Servantes*, 86 Cal. App. 4th 1081 (Cal. Ct. App. 2001), *review denied*, (Cal., May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). The petition for writ of certiorari is currently pending in this Court. A ruling on the scope of preemption provided by 49 U.S.C. §14501(c) will directly affect the citizens of San Francisco.

The City of San Jose, California is a charter city located in Santa Clara County, California and is subject to the jurisdiction of the Ninth Circuit. The City of San Jose currently has a case challenging the City's tow ordinance pending before the Ninth Circuit. Any ruling on the preemptive effects of 49 U.S.C. §14501(c) will directly impact tow truck regulation in the City of San Jose.

Amici curiae's specific interest in this case lies in the impact that this Court's ruling will have on local governments throughout the United States. Of all the various sorts of transportation that may fall within the ambit of interstate commerce, none is so essentially local in nature as towing. Most drivers who are faced with a disabled vehicle neither want or need a long-distance tow across state lines. As a practical matter, drivers universally have their vehicles taken someplace near the scene of the mishap or breakdown that necessitated the tow. Accordingly, the tow truck business has traditionally and for many years been regulated solely on a local basis. If the ruling in the Court of Appeals in this case is allowed to stand, that role will be eliminated. Indeed, the construction given by the Sixth Circuit as to the breadth of the preemption provided by 49 U.S.C. §14501(c) will put all tow truck operations outside the reach of local law enforcement. Because nothing in 49 U.S.C. §14501(c) evidences the intent of Congress to create such an expansive preemption, *amici curiae* offer this brief in support of the Petitioners.

SUMMARY OF THE ARGUMENT

Congress clearly did not intend to immunize tow truck operators from the reach of local law enforcement when it deregulated the interstate trucking business. Through a formalistic interpretation of 49 U.S.C. §14501(c), several circuits have determined that Congress did just that by holding that the exceptions to preemption contained in 49 U.S.C. §14501(c)(2) do not apply to local governments. Other courts have found that such an

implausible result was not the intent of Congress because by use of the term "regulatory authority," Congress meant to allow for local safety regulations through the delegation of a state's authority to its local government entities. None of those cases, however, have answered a more basic question: Whether Congress ever meant to create a wholesale preemption of either state or local regulation of the towing industry when Congress specifically limited the preemptive scope of 49 U.S.C. §14501(c) to the prices charged, the routes taken, and the services offered by interstate motor carriers. This Court should grant Petitioner's application for writ of certiorari, resolve the conflict among the circuits, and find that tow truck operators have not been bestowed a Congressional "King's X" over front-line regulation of the uniquely local towing business.

ARGUMENT

By employing certain canons of statutory construction and by entertaining various presumptions as to legislative intent, the Fifth, Sixth, Ninth and Eleventh Circuits have determined that local governments may not continue in their long-standing role as regulators of local tow truck operations. That conclusion is wrong for at least two reasons.

First, as ably argued by the Petitioners, the analysis used by those courts fails to recognize the role of municipal and county governments as local repositories of the states' regulatory authority. There are approximately 16,612 local police and sheriff agencies in the United

States which employ nearly 622,041 sworn law enforcement officers. U.S. Dept. of Justice, Bureau of Justice Statistics, Local Police Departments 1999 at 1 (May, 2001). Those municipal and county employees represent almost 92% of the "safety regulatory authority"of the states. When it comes to tow trucks, it is those officers who carry the bulk of the responsibility for responding to traffic accidents and clearing the streets of disabled vehicles. If the term "safety regulatory authority" does not contemplate the delegation of a state's police power to its political subdivisions then Congress has not just "deregulated" the tow truck business – it has handed tow truck operators a license to ignore the preponderant law enforcement authority existing within the states. Taken to its logical extension, the reasoning of the decisions such as that of the Sixth Circuit in this case means that not only are cities and counties unable to keep, through local regulations, tow truck operators from racing each other to the scene of a disabled vehicle in hopes of obtaining unsolicited business, they are also preempted from enforcing locally-established speed limits and- other traffic regulations against those operators. The term "regulatory authority" cannot both preclude local regulation of towing practices and yet still allow for the local imposition of other safety laws.

Second, the analysis of legislative intent made by the Fifth, Sixth, Ninth and Eleventh Circuits fails to recognize that Congress did not preempt state and local regulation of every conceivable aspect of the business engaged in by interstate motor carriers, including tow trucks.

In relevant part, Section 14501(c) provides:

> " . . . a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of any motor carrier . . . with respect to transportation."

49 U.S.C. §14501(c)(1). Thus, Congress made state and local regulation of only three areas out of bounds: price, routes and service and then only when done "with respect to transportation". Therefore, unless a state or local regulation relates to a "price, route, or service" of a "motor carrier" "with respect to transportation" the law will not be preempted.

Certainly, an ordinance that establishes the maximum price that a tow truck operator may charge for a consensual tow is preempted by Section 14501(c). As applied to towing operations, the concept of "routes" has little meaning. Tow trucks do not have "routes" in the sense clearly intended by Congress in that tow trucks go to the site of the disabled vehicle, wherever that may be. The real question, then, is whether ordinances like those examined by the various circuits affect the "services" of a tow truck operator.

Consider a common-place occurrence: A motorist is involved in a minor, rush-hour accident that disables his vehicle but leaves him fully able to consent to a tow. The accident is tying up traffic. In a market that has been "deregulated" to the extent envisioned by the Fifth, Sixth, Ninth and Eleventh Circuits, the stranded motorist is free to choose his own tow truck operator regardless whether that operator is located hours from the scene of the

accident and whether that company is even equipped to handle the sort of towing involved. Arguably, any ordinance that prohibits a towing company from responding to the accident unless the company could get there within a reasonable time and show up with the proper equipment (or that requires the motorist to use a company meeting those criteria) affects "service". The question this Court should answer is whether the notion of "service" as used by Congress in Section 14501 is that broad. The Columbus ordinance and other regulatory schemes examined by the various circuits attempt to address the practical problems involved with towing disabled vehicles (as well as preventing the acknowledged practice of "chasing"). They are not intended as economic regulations and it was *economic* regulations that Congress sought to preempt when it adopted 49 U.S.C. §14501(c). *See* H.R. CONF. REP. NO. 103-677, at 87 (1994) (State *economic* regulation of motor carrier operations causes significant inefficiencies. . . . ") (emphasis added). They do not attempt to regulate the market for towing services, but only serve the narrow interests of the public in having traffic obstructions and safety hazards quickly and efficiently removed from public streets.

Congress specifically limited the reach of the preemption created by 49 U.S.C. §14501(c) to matters affecting price, route, or service. Because Congress has expressly stated the preemptive reach of Section 14501(c), matters beyond that reach are not implicitly preempted as well. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 at 517 (1992). True, by use of the term "relate to" in Section 14501(c) Congress has conveyed a broad preemptive purpose, *see, Morales v. Trans World Airlines, Inc.*, 504 U.S. 374

at 383 (1992) ("The ordinary meaning of [the] words [relating to] is a broad one. . . . ") That, however, does not answer the question of just how extensive Congress intended its three controlling subjects – price, route, and service – to be when a state or local law ostensibly "relates to" one of those subjects. As stated previously, given its most expansive reading, Section 14501(c) would preempt the enactment or enforcement of a local speed limit ordinance because that ordinance "relates to" a "service". This Court should determine whether that sort of preemption is what Congress clearly intended.[2]

---

[2] This Court has wrestled with a virtually identical issue in the context of airline deregulation involving a preemption statute that follows Section 14501(c) almost word-for-word. *See Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000) (mem.) (O'Conner, J., dissenting from denial of petition for writ of certiorari: "The petition for writ of certiorari in this case presents an important issue that has divided the Courts of Appeals: the meaning of the term 'service' in the portion of the Airline Deregulation Act of 1978 (ADA) that pre-empts any state law 'related to a price, route, or service of an air carrier' "). A determination of the issue in this case could give guidance in that context as well.

CONCLUSION

Amici curiae respectfully request this Court to grant the petition for writ of certiorari in order to address the important questions presented in this case.

Respectfully submitted,

CHARLES M. HINTON, JR.
City Attorney

BRAD NEIGHBOR
First Assistant City Attorney

City of Garland, Texas
P.O. Box 469002
Garland, Texas 75046-9002
(972) 205-2380
(972) 205-2389 [FAX]
bneighbo@ci.garland.tx.us

HENRY W. UNDERHILL, JR.
General Counsel/Executive Director
LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

LOUISE H. RENNE
City Attorney
ROSE-ELLEN HEINZ
Deputy City Attorney
OFFICE OF THE CITY ATTORNEY
City and County of San Francisco
1390 Market Street
6th Floor
San Francisco, CA 94102
(415) 554-3845

George Rios
Assistant City Attorney
City of San Jose
151 W. Mission St.
San Jose, CA 95110
(408) 277-4454

(1)

Nº. 01-419

Supreme Court, U.S.
FILED
NOV 06 2001
OFFICE OF THE CLERK

In The Supreme Court of The United States

CITY OF COLUMBUS, ET AL.,
Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., ET AL.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

JOINT BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*BARRY M. BYRON
JOHN E. GOTHERMAN
Interstate Square Bldg. I
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303

Counsel for Amicus Curiae
The Ohio Municipal League
**Counsel of Record*

BARBARA E. HERRING
JAMES G. BURKHARDT
City of Toledo
1 Government Center
Suite 2250
Toledo, Ohio 43604

Counsel for Amicus Curiae
The City of Toledo

November, 2001

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

9 pp

CONSENT OF THE PARTIES

The Ohio Municipal League, *amicus curiae,* has received the consent of both parties to file the within brief, pursuant to Rule 37.1 of the rules of this court.

The City of Toledo is permitted to file this brief, as a matter of right, pursuant to Rule 37.4 of the rules of this court.

David A. Ferris	Susan E. Ashbrook
Counsel for Respondents	Counsel for Petitioners
Per consent received October 31, 2001	Per consent received November 1, 2001

QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Columbus, (2) the Director of Public Safety for the City, Mitchell Brown, and (3) the License Supervisor of the Public Safety Department for the City, Bobbie Beavers. Respondents are (1) Ours Garage and

Wrecker Service, Inc., and (2) the Towing and Recovery Association of Ohio.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506 (6th Cir. 2001), and the district court's opinion (Pet. App. 33-A) is unreported.

JURISDICTION

The court of appeals entered judgment on June 19, 2001. Pet. App. 3-A. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article I, Section 8 United States Constitution:

"The Congress shall have Power ***

To regulate Commerce with foreign Nations, and among the several States, and withthe Indian Tribes; ***"

The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS

49 U.S.C. § 14501(c)(1) and (2) of the Interstate Commerce Act ("ICA") provide:

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker,

or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

STATEMENT OF THE CASE

The *amici* incorporate, by reference, the **Statement** of the Petitioner, the City of Columbus.

SUMMARY OF ARGUMENT

The Petitioner, the City of Columbus, has ably identified the reasons why this court should accept jurisdiction over this case: different Circuit Courts and state courts have interpreted 49 U.S.C. § 14501 in dramatically different ways. In the instant case, the Sixth Circuit Court of Appeals has construed the statute to prevent the City of Columbus from enacting and enforcing reasonable highway safety regulations against the respondent. Petitioner's arguments stand on their own merits.

The *amici curiae*, the City of Toledo, Ohio and the Ohio Municipal League, seek to add their voices in support of the position of the City of Columbus, and inject a **new legal theory** why the Sixth Circuit Court of Appeals, and certain other courts, have misinterpreted 49 U.S.C. § 14501.

By ruling as it has, the Sixth Circuit Court of Appeals has subjected 49 U.S.C. § 14501 to "constitutional doubt.". The lower court's opinion seems to suggest that Congress has the authority to control the **intra**state distribution of police powers. This interpretation would grant to Congress power which exceeds its Constitutional power to regulate **inter**state commerce, pursuant to Article I, Section 8 of the Constitution, which is contrary to, and in violation of, the Tenth Amendment to the United States Constitution. The *amici* respectfully suggest that the doctrine of "constitutional doubt" should be applied in this matter. The statute, which is susceptible to different interpretations, should **not** be interpreted in a way which implicates a violation of the fundamental principles of federalism. Thus, the interpretation of the statute, which is proposed by the City of Columbus, should be adopted by this court as the law of the land.

ARGUMENT

The Doctrine of Constitutional Doubt

This Court has recently described the doctrine and rationale of "constitutional doubt":

"As Justice Holmes said long ago: **'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'** *United States v. Jin Fuey Moy,* 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916) (citing *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408, 29 S.Ct. 527, 535-536, 53 L.Ed. 836 (1909)); see also *Ashwander v. TVA,* 297 U.S. 288, 348, 56 S.Ct. 466, 483-484, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). **'This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.'** *Rust v. Sullivan,* 500 U.S. 173, 191, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991); see also *FTC v. American Tobacco Co.,* 264 U.S. 298, 305-307, 44 S.Ct. 336, 337-338, 68 L.Ed. 696 (1924)." (Emphasis added.) *Almendarez-Torez v. United States*, 523 U.S. 224 at 237-238, 118 S.Ct. 1219 at 1227-1228, 140 L.Ed.2d 350 (1998).

The doctrine does not require a finding that the statute is unconstitutional; rather, the inquiry is limited to a determination whether serious constitutional doubt exists as to a viable interpretation of the statute. *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, at 408, 29 S.Ct. 527, at 535, 53 L.Ed. 836 (1909).

It is with this framework in mind that the *amici* raise the following argument.

The Interpretation Riddled with Constitutional Doubt

Congress, according to the Sixth Circuit and other courts, has authorized the States to regulate highway safety, but prevented the political subdivisions of states from doing so. By ruling as they have, these courts have held that Congress has the authority to control the **intra**state distribution of police powers. This interpretation grants to Congress power which exceeds its Constitutional power to regulate **inter**state commerce, pursuant to Article I, Section 8 of the Constitution. It is respectfully submitted that such a statute would be contrary to the Tenth Amendment to the United States Constitution.

In *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), this Court considered the federal government's authority to compel individual states to enforce federal regulations. In ruling that Congress lacked the authority to compel the States to enforce federal law, this Court stated:

"While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, **the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.** See *Coyle v. Smith,* 221 U.S. 559, 565, 31 S.Ct. 688, 689, 55 L.Ed. 853 (1911). The Court has been explicit about this distinction. 'Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens,* instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.' *Lane County v. Oregon,* 7

Wall., at 76." (Emphasis added, and as in original).*Id.*, 505 U.S. 144 at 162, 112 S.Ct. 2408 at 2421, 120 L.Ed.2d 120.

New York, supra, goes on to say:

"We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *E.g., FERC v. Mississippi,* 456 U.S., at 762-766, 102 S.Ct., at 2138-2141; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288-289, 101 S.Ct., at 2366; *Lane County v. Oregon,* 7 Wall., at 76. **The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.**" (Emphasis added.)*Id.*, 505 U.S. 144 at 166, 112 S.Ct. 2408 at 2423.

The position of the *amici* also finds support in language from *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958). While holding that the City of Chicago could not interfere with the mandate of the railroads (as common carriers) to provide transportation between railroad stations in Chicago, the local government retained significant police power:

"We are fully aware that use of local streets is involved, but no one suggests that Congress cannot require the City to permit interstate commerce to pass over those streets. **Of course the City retains considerable authority to regulate how transfer vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly the City may require registration**

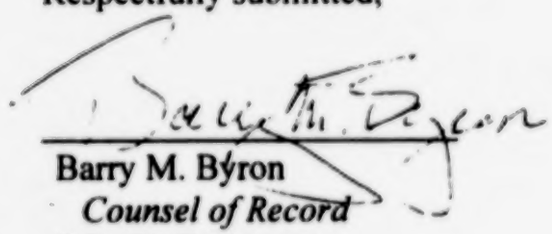
vehicles and exact reasonable fees for their use of the local streets. *Cf. Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed. 168; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053." (Emphasis added.) *Id.*, at 88, 78 S.Ct. at 1069-1070.

Implicit in the *Chicago* case is the notion that Congress' authority is limited to the regulation (or, more accurately in this case, the protection) of interstate commerce. To the extent Congress might attempt to limit the distribution of police powers within a state (after permitting the state government to pass such safety regulations), such action would run afoul of the Constitution.

CONCLUSION

The petition should be granted, and the judgment of the Sixth Circuit should be reversed. 49 U.S.C. § 14501 should be interpreted in such a manner as would avoid constitutional doubt.

Respectfully submitted,



Barry M. Byron
Counsel of Record
John E. Gotherman
Interstate Square Building I
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303

Counsel for Amicus Curiae
The Ohio Municipal League

Barbara E. Herring
Law Director
James G. Burkhardt
Senior Attorney
City of Toledo
1 Government Center
Suite 2250
Toledo, Ohio 43604

Counsel for Amicus Curiae
The City of Toledo

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01–419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

RICHARD A. CORDRAY*
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

Counsel for Respondents

**Counsel of Record*

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street, Suite 200
Columbus, Ohio 43215
(614) 645-7385

JEFFREY S. SUTTON*
TRACI L. LOVITT
RONALD E. LAYMON
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

Petition for Certiorari Filed September 7, 2001
Certiorari Granted January 4, 2002

24 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Complaint	7
Answer	12
Plaintiffs' Motion for Summary Judgment and Injunctive Relief	15
Defendants' Motion for Summary Judgment	18
Judgment	20
Order Granting Petition for a Writ of Certiorari	22

RELEVANT DOCKET ENTRIES

BEFORE THE U.S. DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO EASTERN DIVISION
CASE NO. C2-99-310

1.	3/29/99	Complaint with Exhibits A through C.
2.	3/29/99	Motion by plaintiff Ours Garage & Wrecker and plaintiff Towing & Recovery Association for preliminary injunction.
3.	4/12/99	Memorandum In Opposition (with Exhibits A and B) by defendant to motion for preliminary injunction.
4.	5/10/99	Answer by defendant City of Columbus OH, defendant Thomas W. Rice Sr. and defendant Bobbie Beavers.
5.	5/17/99	Response (with Exhibits A through J) by defendant to motion for preliminary injunction.
6.	5/17/99	Motion by plaintiffs for summary judgment.
7.	5/21/99	Order by Magistrate Judge Norah M. King re pretrial conference.
8.	5/24/99	Motion (with Exhibits A through J) by defendant City of Columbus OH, defendant Thomas W. Rice Sr. and defendant Bobbie Beavers for summary judgment.
9.	6/1/99	Response by plaintiff Ours Garage & Wrecker and plaintiff Towing & Recovery Association to motion for summary judgment.

10.	11/5/99	Supplemental Authority by plaintiffs re response to motion for summary judgment, re motion for summary judgment and re motion for preliminary injunction.
11.	3/10/00	Order by Judge George C. Smith granting motion for summary judgment by plaintiff Ours Garage & Wrecker and plaintiff Towing & Recovery Association dismissing case.
12.	3/10/00	Judgment by Judge George C. Smith entered in favor of plaintiffs and against defendants dismissing case permanently and enjoining defendants from applying or enforcing Chapter 549 of the Columbus City Code with respect to the plaintiffs named in this action or any members of plaintiff Training & Recovery Association.
13.	3/20/00	Motion by defendant City of Columbus OH, defendant Thomas W. Rice Sr. and defendant Bobbie Beavers to stay injunction pending appeal.
14.	3/20/00	Notice of Appeal by defendant City of Columbus OH, defendant David Wilson, defendant Bobbie Beavers from District Court decision of 3/10/00.
15.	4/13/00	Response by plaintiffs to motion to stay injunction pending appeal.
16.	3/20/01	Order by Judge George C. Smith denying motion to stay injunction pending appeal.

17.	4/16/01	Record Certified to Sixth Circuit.

BEFORE THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT DOCKET NO. 00-3409

1.	4/5/00	Civil Case Docketed. Notice filed by Appellant City of Columbus, Appellant David Wilson and Appellant Bobbie Beavers.
2.	6/6/00	Proof Brief filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant David Wilson and Appellant City of Columbus.
3.	6/6/00	Request to require oral argument filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant David Wilson and Appellant City of Columbus.
4.	6/14/00	Brief filed by James G. Burkhardt for Amicus Curiae City of Toledo.
5.	7/14/00	Request to require oral argument filed by David A. Ferris for Appellee Towing & Recovery Association and Appellee Ours Garage & Wrecker.
6.	7/17/00	Proof Brief filed by David A. Ferris for Appellee Towing & Recovery Association and Appellee Ours Garage & Wrecker.

7.	8/2/ 0	Proof Reply Brief filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant David Wilson and Appellant City of Columbus.
8.	8/8/00	Appendix filed by Susan E. Ashbrook for Appellant.
9.	8/22/00	Final Brief filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant David Wilson and Appellant City of Columbus.
10.	8/22/00	Final Reply Brief filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant David Wilson and Appellant City of Columbus.
11.	8/29/00	Final Brief filed by David A. Ferris for Appellee Towing & Recovery Association and Appellee Ours Garage & Wrecker.
12.	3/21/01	Record requested from District Court.
13.	3/28/01	Oral argument date set for June 7, 2001, in court room 636. Notice of argument sent to counsel.
14.	4/17/01	Certified Record filed.
15.	4/26/01	Ruling granting motion to allow amicus curiae, City of Toledo, to appear filed by James G. Burkhardt.

16.	5/4/01	Joint Motion filed to waive oral argument and submit case on the briefs. Motion filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant City of David Wilson and Appellant Columbus; David A. Ferris for Appellee Towing & Recovery Association and Appellee Ours Garage & Wrecker.
17.	5/4/01	Supplemental Brief filed by Susan E. Ashbrook for Appellant Bobbie Beavers, Appellant David Wilson and Appellant City of Columbus.
18.	5/4/01	Supplemental Brief filed by David A. Ferris for Appellee Towing & Recovery Association and Appellee Ours Garage & Wrecker.
19.	5/4/01	Cause Submitted on briefs to panel consisting of Judges Keith, Batchelder, Moore sitting on 6/7/01.
20.	5/11/01	Order filed granting motion to waive oral argument and submit on briefs. Entered by order of the court.
21.	6/19/01	Opinion filed: Affirmed, decision for publication pursuant to local rule 206. Damon J. Keith, Circuit Judge, Alice M. Batchelder, Authoring Judge, Karen N. Moore, Circuit Judge.
22.	6/19/01	Judgment affirmed.

23.	6/22/01	Opinion Correction Letter sent indicating revisions to published opinion filed June 19, 2001.
24.	7/11/01	Mandate Issued with no cost taxed.
25.	7/11/01	Certified Record Returned to lower court at the end of appellate proceedings.
26.	9/12/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant City of Columbus, et al. Filed in the U.S. Supreme Court on 09-07-01.

[Filed Mar. 29, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

OURS GARAGE AND WRECKER SERVICE, INC., 121 Canal Street Hebron, Ohio 43025,	:	
and	:	
TOWING AND RECOVERY ASSOCIATION OF OHIO, 121 Canal Street Hebron, Ohio 43025,	:	
Plaintiffs,	:	
v.	:	Case No. C2 99-310
CITY OF COLUMBUS, OHIO,	:	Judge Smith
and	:	Magistrate Judge King
THOMAS W. RICE, SR., Individually and in his official capacity as DIRECTOR of PUBLIC SAFETY for the CITY OF COLUMBUS, 50 West Gay Street Columbus, Ohio 43215,	:	
and	:	

BOBBIE BEAVERS, :
Individually and in her official :
capacity as LICENSE :
SUPERVISOR of the PUBLIC :
SAFETY DEPARTMENT for :
the CITY OF COLUMBUS, :
240 Greenlawn Avenue :
Columbus, Ohio 43223, :
:
Defendants. :

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COME NOW the plaintiffs, Ours Garage and Wrecker Service, Inc. ("Ours") and Towing and Recovery Association of Ohio ("TRAO"), by and through their attorneys, and complaining against defendants, the City of Columbus, Ohio, Thomas W. Rice, Sr., individually and in his official capacity as Director of Public Safety for the City of Columbus, and Bobbie Beavers, individually and in her official capacity as License Supervisor of the Public Safety Department for the City of Columbus, states as follows:

1. Ours is a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business located in Licking County, Ohio.

2. TRAO is a trade organization comprised of members conducting business in the towing and recovery industry. A membership list is attached and incorporated herein as Exhibit "A." TAO maintains its principal office in Licking County, Ohio.

3. The City of Columbus, Ohio is a political subdivision of the State of Ohio, organized and existing under the laws of the State of Ohio, and located in Franklin County, Ohio.

4. Thomas W. Rice, Sr. is the Director of the Public Safety Department for the City of Columbus, Ohio.

5. Bobbie Beavers is the License Supervisor of the Public Safety Department for the City of Columbus, Ohio.

6. This Court maintains jurisdiction and venue in this matter, because the actions which are the subject of this complaint pertain directly to application of the Interstate Commerce Act (the "ICA"), as amended by the Federal Aviation Administration Authorization Act of 1994 (the "FAAA Act") and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), and their preemption of ordinances enacted by states and political subdivisions thereof to regulate consensual tow truck operations.

7. Defendants have implemented, and are currently enforcing, Chapter 549 of the Columbus City Code, entitled "Tow Trucks" (the "Towing Regulations"), which regulate consensual tow truck operations in violation of the ICA. Specifically, Section 549.02 provides, in pertinent part:

> ...No owner of a tow truck shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid tow truck owner's license obtained pursuant to this chapter has been issued and is in force for that tow truck.
>
> No tow truck operator shall engage in the towing of any vehicle within the City of Columbus or offer such service to the owner or operator of any vehicle unless a valid tow truck operator's license obtained pursuant to this chapter has been issued and is in force for that tow truck operator...

A copy of Chapter 549, in its entirety, is attached and incorporated herein as Exhibit "B."

8. The ICA exempts consensual tow truck operations from regulation by states and political subdivisions thereof and states, in pertinent part:

> General Rule.— Except as provided in paragraphs (2) and (3), a State, [or a] political subdivision of a State, ...may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier...with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). This preemption clause is strengthened by Congress' addition of 49 U.S.C. § 14501(c)(2)(C), which states that section 14501(c)(1) does not apply to the authority of a state or a political subdivision to enact or enforce an ordinance relating to the price of towing services "if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. § 14501(c)(2)(C).

9. Columbus' Towing Regulations are related to the provision of consensual towing services, because Chapter 549 of the Columbus City Code, including, but not limited to, section 549.02, limits who is permitted to provide the services and requires that individuals and companies satisfy various criteria before they provide the services.

10. States and political subdivisions are preempted, by the ICA, in their enactment or enforcement of ordinances regulating consensual towing operations. *R. Mayer of Atlanta, Inc. v. City of Atlanta* (11th Cir. 1998), 1998 U.S. App. LEXIS 27886 (copy attached and incorporated herein as Exhibit "C").

11. Political subdivisions are preempted, by the ICA, in their enactment or enforcement of ordinances regulating safety or insurance requirements for motor carriers, including towing companies. 49 U.S.C. § 14501(c)(2)(A). *See also, R. Mayer of Atlanta, Inc., supra.*

WHEREFORE, plaintiffs, Ours Garage and Wrecker Service, Inc. and Towing and Recovery Association of Ohio, respectfully requests that this Court enter judgment on its behalf and that the Court:

(a) Preliminarily and permanently enjoin defendants, and their officers, agents, servants, employees, attorneys, and those in active concert or participation with them, from applying or enforcing Chapter 549 of the Columbus City Code; and

(b) Order whatever relief, legal or equitable, which this case warrants, including reasonable attorneys' fees and the costs of this action.

Respectfully submitted,

/s/ David A. Ferris

David A. Ferris (Ohio Atty. No. 0059804)
FERRIS & FERRIS
2733 W. Dublin-Granville Road
Columbus, Ohio 43235-2798
(614) 889-4777
Fax: (614) 889-6515

Attorneys for the plaintiffs,
Ours Garage and Wrecker Service, Inc. and
Towing and Recovery Association of Ohio

[Filed May 10, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DISTRICT

OURS GARAGE AND WRECKER SERVICE, INC., et al.,	:	
	:	Case No. C2-99-310
Plaintiffs,	:	
	:	Judge Smith
v.	:	
	:	Magistrate Judge King
CITY OF COLUMBUS, OHIO, et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' ANSWER TO PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Now come Defendants, City of Columbus, Thomas W. Rice, Sr., and Bobbie Beavers, who answer and defend the Verified Complaint filed by Plaintiffs, Ours Garage and Wrecker Service, Inc. and Towing and Recovery Association of Ohio, as follows:

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' Verified Complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' Verified Complaint.

3. Defendants admit the allegations contained in Paragraph 3 of Plaintiffs' Verified Complaint.

4. Defendants admit the allegations contained in Paragraph 4 of Plaintiffs' Verified Complaint.

5. Defendants admit the allegations contained in Paragraph 5 of Plaintiffs' Verified Complaint.

6. Defendants admit that the actions which are the subject of Plaintiffs' Verified Complaint pertain directly to the application of the Interstate Commerce Act, as amended by the Federal Aviation Administration Authorization Act of 1994 and the Interstate Commerce Commission Termination Act of 1995, and deny the remaining allegations contained in Paragraph 6 of Plaintiffs' Verified Complaint.

7. Defendants admit the allegations contained in Paragraph 7 of Plaintiffs' Verified Complaint.

8. Defendants admit that the quoted language included in Paragraph 8 of Plaintiffs' Verified Complaint is accurately cited, however, Defendants deny the remaining allegations or implications that are created by the balance of Paragraph 8 of Plaintiffs' Verified Complaint.

9. Defendants admit the allegations contained in Paragraph 9 of Plaintiffs' Verified Complaint.

10. Defendants deny the allegations contained in Paragraph 10 of Plaintiffs' Verified Complaint.

11. Defendants deny the allegations contained in Paragraph 11 of Plaintiffs' Verified Complaint.

FIRST AFFIRMATIVE DEFENSE

12. Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

13. Defendants are entitled to all applicable immunity, defenses, and limitations on liabilities as set forth in Chapter 2744 of the Ohio Revised Code and/or as recognized by state or federal law.

THIRD AFFIRMATIVE DEFENSE

14. Defendants reserve the right to assert additional defenses after discovery is completed.

WHEREFORE, having answered, Defendants specifically deny any and all allegations admitted to be true herein and respectfully request that Plaintiffs' Verified Complaint be dismissed with prejudice and costs assessed to Plaintiff.

Respectfully submitted,

CITY OF COLUMBUS, DEPARTMENT OF LAW
JANET E. JACKSON, CITY ATTORNEY

/s/ Kristine L. Hayes

Kristine L. Hayes (0069778)
Assistant City Attorney
City Hall, Room 200
90 West Broad Street
Telephone: (614) 645-7385
Columbus, Ohio 43215
Trial Attorney for Defendants

[Filed May 17, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

OURS GARAGE AND WRECKER SERVICE, INC., et al.,	:	
Plaintiffs,	:	Case No. C2-99-310
v.	:	
CITY OF COLUMBUS, OHIO, et al.,	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs, Our Garage and Wrecker Service, Inc. ("Ours") and Towing and Recovery Association of Ohio ("TRAO"), brought this action against defendants, the City of Columbus, Ohio ("Columbus"), Thomas W. Rice, Sr., individually and in his official capacity as Director of Public Safety for the City of Columbus, and Bobbie Beavers, individually and in her official capacity as License Supervisor of the Public Safety Department for the City of Columbus (collectively, the "defendants"), to prevent application, implementation and enforcement of Chapter 549 of the Columbus City Code (the "Towing Ordinance"), which violates the provisions of the Interstate Commerce Act ("ICA"), as amended by the Federal Aviation Administration Authorization Act of 1994 (the "FAAA Act") and the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA"), preempting

regulation of towing operations by political subdivisions of a state.

Ours is an Ohio corporation conducting towing operations in and around the City of Columbus. TRAO, the other plaintiff in this proceeding, is comprised of members conducting tow truck operations within the State of Ohio, including, in some instances, Columbus. Members are affected by the Towing Ordinance, since it prohibits both consensual and non-consensual towing operations by any towing company not registered with Columbus as such. In order to obtain such registration, the towing companies must submit their equipment and drivers for examination by defendants and must pay a registration fee.

* * *

Defendants' towing regulations are preempted by 49 U.S.C. § 14501(c)(1), and no exceptions permit this type of local rule. The reasoning of the Eleventh Circuit in *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), is concise and on point, as well as reflective of the Sixth Circuit's approach to preemption in other areas of law. The intent of Congress in deregulating the transportation industry and preempting state and local laws relating to price, route, or service was to create a level playing field on which all motor carriers could compete freely and without undue restraint. Defendants' towing regulations are an indication of the type of patchwork regulation Congress sought to avoid and, in fact, preempt. Plaintiffs are, therefore, entitled to summary judgment and injunctive relief against Defendants.

Respectfully submitted,

/s/ David A. Ferris

David A. Ferris (0059804)
FERRIS & FERRIS
2733 W. Dublin-Granville Road
Columbus, Ohio 43235-2798
(614) 889-4777
Fax: (614) 889-6515

Attorneys for Plaintiffs,
Ours Garage and Wrecker Service, Inc.
and Towing and Recovery Association of
Ohio

[Filed May 24, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DISTRICT

OURS GARAGE AND WRECKER SERVICE, INC., et al.,	:	
	:	Case No. C2-99-310
Plaintiffs,	:	
	:	Judge Smith
v.	:	
	:	Magistrate Judge King
CITY OF COLUMBUS, OHIO, et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Now comes defendants, City of Columbus, Thomas W. Rice, Sr., and Bobbie Beavers; pursuant to Civ. R. 56(B), to respectfully move this Court for a summary judgment of dismissal. From the pleadings and evidence properly before this Court, movant submits that there are no genuine issues as to any material fact and that defendant is entitled to summary judgment as a matter of law. The basis for this motion is more fully and completely set forth in the attached Memorandum of Support.

Respectfully submitted,

CITY OF COLUMBUS,
DEPARTMENT OF LAW
JANET E. JACKSON, CITY
ATTORNEY

/s/ Kristine L. Hayes
Kristine L. Hayes (0069778)
Assistant City Attorney
City Hall, Room 200
90 West Broad Street
Telephone: (614) 645-7385
Columbus, Ohio 43215

Trial Attorney for Defendants

[Filed Mar. 10, 2000]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

OURS GARAGE &
WRECKER SERVICE,
et al.,

Plaintiff,

v.s.

CITY OF COLUMBUS,
et al.,

Defendant.

Case No. C2-99-0310

Judge Smith
Magistrate Judge King

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[ ] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed March 10, 2000, FINAL JUDGMENT is hereby entered in favor of plaintiffs, and against defendants, permanently enjoining defendants from applying or enforcing Chapter 549 of the Columbus City Code with respect to the plaintiffs named in this action or

any members of the plaintiff TRAO. This action is dismissed.

Date: March 10, 2000

KENNETH J. MURPHY
CLERK

/s/ G. Wellman
By / Deputy Clerk

**IN THE SUPREME COURT
OF THE UNITED STATES**

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on January 4, 2002.

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

(9)

No. 01–419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street
Suite 200
Columbus, Ohio 43215
(614) 645-7385

JEFFREY S. SUTTON
(*Counsel of Record*)
TRACI L. LOVITT
RONALD E. LAYMON
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

7818

QUESTION PRESENTED

In preserving the "safety regulatory authority of a State with respect to motor vehicles," does 49 U.S.C. § 14501(c)(2)(A) allow States to delegate authority to their political subdivisions to enact safety-related tow-truck regulations or does it compel state legislatures to enact all such laws themselves?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT 2

A. History Of Towing And Towing Regulation In The United States 2

B. History Of Columbus Towing Regulations 7

C. History Of Relevant Federal Statutes And Regulations 9

1. History Of Interstate Regulation 9

2. History Of Intrastate Regulation 11

D. History Of The Case 12

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. SECTION 14501(c)(2)(A) PERMITS STATE LEGISLATURES TO REGULATE TOWING SAFETY DIRECTLY OR TO DELEGATE IT TO OTHER POLITICAL SUBDIVISIONS 16

A. The "Safety Regulatory Authority Of A State" Includes Local Safety Regulations Promulgated In Accordance With State Delegations Of Power 16

B. *Mortier* Confirms This Settled Understanding .. 17

TABLE OF CONTENTS
(continued)

Page

C. For More Than Two Centuries, The Delegation Of State Police Powers To Local Governments Has Been A Fixed Part Of The American Legal Landscape 19

II. THE COURT OF APPEALS' CONTRARY ANALYSIS IS WRONG 21

A. The Lower Court's Reliance On Congress's Specific Mention Of "Political Subdivisions" In Other Subsections Of § 14501 Was Misplaced 21

1. The *Russello* Principle Is Designed To Eliminate Ambiguity, Not To Create It 21

2. In 1994, Congress Had Legitimate Reasons For Mentioning Specific Political Bodies By Name In Some Sections Of § 14501 But Not In Others 22

a. The Differences Between § 14501(c)(1) And § 14501(c)(2)(A) Have Several Legitimate Explanations 23

b. The Other Provisions Of § 14501 That Mention "Political Subdivisions" Do Not Alter This Analysis 24

3. The Court Of Appeals' Application Of *Russello* Creates More Interpretive Problems Than It Solves 26

a. The Decision Below Undermines The *Enforcement* Of All Safety Laws 26

TABLE OF CONTENTS
(continued)

Page

b. The Decision Below Undermines Local Size, Weight And Hazardous-Materials Route Regulations 27

c. The Decision Below Undermines The Federal Government's Own Assessment Of The Cooperative Federal, State And Local Authority That Exists In This Area 28

B. The Deregulatory Function Of The Statute Is Not Advanced By The Court Of Appeals' Decision 32

C. The Legislative History Does Not Advance The Court Of Appeals' Analysis 32

III. THE SAFETY EXCEPTION SHOULD BE READ TO PRESERVE RATHER THAN TO ALTER THE BALANCE BETWEEN THE FEDERAL GOVERNMENT AND THE STATES 34

A. The Clear-Statement Doctrine Applies Here ... 35

B. Congress Has Not Satisfied The Clear-Statement Requirement Here 37

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Cases

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999) 6
Almendarez-Torres v. United States, 523 U.S. 224 (1998) 36
Anderson v. Robbins Incubator Co., 8 N.W.2d 446 (Neb. 1943) 4
Andrada v. City of San Antonio, 555 S.W.2d 448 (Tex. Civ. App. 1977) 6
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 35
Beaucage v. Mercer, 92 N.E. 774 (Mass. 1910) 2
Bd. of Comm'rs of Tippecanoe Co. v. Lucas, 93 U.S. 108 (1876) 19
Bd. of County Comm'r v. Bowen/Edwards Assoc., 830 P.2d 1045 (Colo. 1992) 17
Body, Fender & Brake Corp. v. Matter, 172 Va. 26 (Va. 1939) 3
Buck v. Kuykendall, 267 U.S. 307 (1925) 9
Burns Motor Co. v. Briggs, 160 N.E. 728 (Ohio Ct. App. 1928) 3
Cal. Dump Truck Owners Ass'n v. Davis, 172 F.Supp. 2d 1298 (E.D. Cal. 2001) 28
City of Chattanooga v. Fanburg, 265 S.W.2d 15 (Tenn. 1954) 4, 5
City of Cincinnati v. Reed, 500 N.E.2d 333 (Ohio Ct. App. 1985) 8
City of Dallas v. Harris, 157 S.W.2d 710 (Tex. Civ. App. 1941) 5
City of Newport v. Iacobucci, 479 U.S. 92 (1986) 17
City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539 (1905) 19
Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) 22

TABLE OF AUTHORITIES
(continued)

Page

Coyle v. Smith, 221 U.S. 559 (1911) 37
Del Balso Holding Corp. v. McKenzie, 271 N.Y. 313 (N.Y. 1936) 17
Dellnuth v. Muth, 491 U.S. 223 (1989) 36
Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973) 35
Engle v. Nelson, 263 N.W. 505 (Iowa 1935) 4
Field v. Mans, 516 U.S. 59 (1995) 22, 26
Fraley v. J. Calvert's Sons, 254 N.W. 167 (Mich. 1934) 3, 4
Frame v. Arrow Towing Serv., 64 P.2d 1312 (Or. 1937) 4
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 35
Glasgow v. Dorn, 220 S.W. 509 (Mo. Ct. App. 1920) ... 3
Gregory v. Ashcroft, 501 U.S. 452 (1991) 36, 37, 38
Grogan v. Garner, 498 U.S. 279 (1991) 34
Gulf Brewing Co. v. Goodwin, 135 S.W.2d 812 (Tex. Civ. App. 1939) 4
Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) 22
H.P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) . 10
Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) .. 19, 36
INS v. Cyr, 533 U.S. 289, 121 S. Ct. 2271 (2001) 36
Librizzi v. Plunkett, 16 A.2d 280 (N.J. 1940) 5
Martin v. Hadix, 527 U.S. 343 (1999) 25
Maryland v. Baltimore & Ohio R.R. Co., 44 U.S. 534 (1845) 19
Maurer v. Hamilton, 309 U.S. 598 (1940) 10
Morissette v. United States, 342 U.S. 246 (1952) 19
Musgrave v. Studebaker Bros. Co. of Utah, 160 P. 117 (Utah 1916) 2

TABLE OF AUTHORITIES
(continued)

Page

Neb. Natural Gas Co. v. City of Lexington, 93 N.W.2d 179 (Neb. 1958) 17
New York v. United States, 505 U.S. 144 (1992) 34
O'Gilve v. United States, 519 U.S. 79 (1996) 25
Our Garage & Wrecker Serv. v. City of Columbus, 257 F.3d 506 (6th Cir. 2001) 1, 13
People v. Mann, 48 N.E.2d 274 (N.Y. 1943) 4
People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336) 7
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) 13, 21, 32, 33
Printz v. United States, 521 U.S. 898 (1997) 34
Ry. Exp. Agency v. New York, 336 U.S. 106 (1949) 20
Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) .. 27
Russello v. United States, 464 U.S. 16 (1983) ..... *passim*
Sailors v. Bd. of Educ., 387 U.S. 105 (1967) 37
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 18
Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942) 17
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 34
Sharp v. Barnhart, 117 F.2d 604 (7th Cir. 1941) 9
Silverstein v. Schneider, 164 A. 480 (N.J. 1933) 3
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 31
Sproul v. City of Wooster, 840 F.2d 1267 (6th Cir. 1988) 17
Sterling v. Constantin, 287 U.S. 378 (1932) 17
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028) 6
Titus v. Tangeman, 101 N.Y.S. 1000 (N.Y. App. Div. 1906) 2

TABLE OF AUTHORITIES
(continued)

Page

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert denied*, 531 U.S. 1146 (2001) 7
Tower v. Camp, 130 A. 86 (Conn. 1925) 3
Traweek v. City of San Francisco, 920 F.2d 589 (9th Cir. 1990) 17
Tsutras Automatic Phonograph Co. v. City of Williamson, 51 S.E.2d 427 (W.Va. 1949) 17
United States v. Baltimore & Ohio R.R. Co., 84 U.S. 322 (1872) 19
United States v. Bass, 404 U.S. 336 (1971) 35
United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001) 31
United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 38
United States v. Pa. Co., 239 F. 761 (W.D. Pa. 1917) 2
Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 35
Vonderhaar v. Parish of St. Tammany, 633 So. 2d 217 (La. Ct. App. 1993) 17
Wilkowsky v. Grant Iron & Metal Co., 189 N.W. 10 (Mich. 1922) 3
Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) . 37
Williams v. Consumers' Co., 185 N.E. 217 (Ill. 1933) 4
Wilson v. City of Seattle, 863 P.2d 1336 (Wash. 1993) .. 17
Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) ..... *passim*

Federal Statutes & Regulations

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ..... 10, 11
Civil Aeronautics Act of 1938, Pub. No. 706, 52 Stat. 973 10

TABLE OF AUTHORITIES
(continued)

Page

Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 10
Federal Aviation Administration Authorization Act, Pub. L. No. 103-305, 108 Stat. 1569 (1994) 11, 29
Motor Carrier Act of 1935, Pub. No. 255, 49 Stat. 543 9
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 10
Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, 98 Stat. 2832 11
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 11
7 U.S.C. § 136v (1988) 17, 18
28 U.S.C. § 1254(1) 1
Transportation Code (49 U.S.C.)
§ 5112 30
§ 13101(a)(1)(B) 26
§ 14501(a)(1) 24
§ 14501(c)(1) ..... *passim*
§ 14501(c)(2)(A) ..... *passim*
§ 14501(c)(2)(C) 24
§ 14501(c)(3) 24, 25
§ 31104(h) 11, 24, 29
§ 31136 ..... 11, 24, 29
§ 31141 ..... 11, 24, 29
49 C.F.R. § 350.335 ..... 11, 24, 29
49 C.F.R. § 355 ..... 11, 23, 29
49 C.F.R. § 397.3 30
49 C.F.R. § 397.69 30
49 C.F.R. § 397.71 30

TABLE OF AUTHORITIES
(continued)

Page

Other Federal Legislative Material

H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715 ..... 11, 12, 33
Dep't of Transportation, *Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305* 31
Fed. Highway Admin., Dep't of Transportation, *General Jurisdiction Over Freight Forwarder Service*, 62 Fed. Reg. 4096 (Jan. 28, 1997) 31
Fed. Motor Carrier Safety Admin., Dep't of Transportation, *Cleveland, Ohio Requirements for Transportation of Hazardous Materials*, 66 Fed. Reg. 29,867 (June 1, 2001) 31

State Statutes & City Ordinances

Ohio Const. art. XVIII, § 3 8
Ohio Rev. Code Ann. § 715.22 8
Ohio Rev. Code Ann. § 723.01 8
Ohio Rev. Code Ann. § 4921.02(A)(8) 8
Ohio Rev. Code Ann. § 4923.02(A)(10) 8
Columbus, Ohio, City Code § 549 *et seq.* 7, 8
Arlington, Va., County Code of Ord. § 14.2 27
Concord, N.H., Code art. 5-3-2 27
Des Moines, Iowa, Code § 114-460.03 27
Fort Wayne, Ind., Code ch. 75.02 27
Fremont, Cal., Code § 3-2707 27
Houston, Tex., Code § 45-58 27
Knoxville, Tenn., Code § 17-419 28
Manhattan, Kan., Code § 31-1 28
N.Y., N.Y., Rules & Reg. § 4-15(h) 27
Scottsdale, Ariz., Code § 17-61 28
Tucson, Ariz., Code § 13-15 27

TABLE OF AUTHORITIES
(continued)

Page

Miscellaneous

American Heritage Dictionary of the English Language (4th ed. 2000) 16
Chester J. Antieau & William J. Rich, *Modern Constitutional Law* (2d ed. 1997) 20
Charles J. Babbitt, *The Law Applied to Motor Vehicles* (4th ed. 1933) 19
Black's Law Dictionary (7th ed. 1999) 16
Xenophon P. Huddy, *Encyclopedia of Automobile Laws* (9th ed. 1932) 19
Ron Kowalke, *Old Car Wrecks and the Vehicles at Accident Scenes, 1920s to 1960s* (1997) 3
McQuillin on The Law of Municipal Corporations (3d ed. 1949) 5
Peter E. Randall, *Tugboats on the Piscataqua* (1992) 2
Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 35
Webster's Third New Int'l Dictionary (1968) 16
Don Wood, *Half-Hour History of Tow Trucks*, 160 Special Interest Autos 54 (July/Aug. 1997) 3

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506, and the opinion of the district court (Pet. App. 33-A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2001. Pet. App. 1-A. The petition for a writ of certiorari was filed on September 7, 2001. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

As presently codified, the pertinent provisions of 49 U.S.C. § 14501 read as follows:

§ 14501. Federal authority over intrastate transportation.

***

(c) Motor carriers of property. —

(1) General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. — Paragraph (1) —

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial

responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. §§ 14501(c)(1) & (2)(A). The full text of the current version of 49 U.S.C. § 14501 and the history of amendments to it are set forth in an appendix to this brief. *See* Br. App. at A-1—A-4; B-1—B-14.

STATEMENT

A. History Of Towing And Towing Regulation In The United States.

With every step forward in the development of new modes of mechanical transportation, inventors and travelers have had to cope with the inevitability that the innovative machines would break down from time to time. The tugboat, for example, appeared soon after the invention of the steamship, and was created to help "vessels in distress—aground, dismasted, sinking or otherwise damaged." Peter E. Randall, *Tugboats on the Piscataqua* 1 (1992). The "wrecker train" likewise was an inevitable byproduct of the railroad and was designed to put derailed trains back on track. *See United States v. Pa. Co.*, 239 F. 761, 762 (W.D. Pa. 1917).

The development of the tow truck followed a similar pattern. Even before the introduction of the Model T, primitive "tow trucks" were common in American cities and towns. When cars or farm equipment broke down, neighbors frequently would tie a rope to the disabled vehicle, connect it to a working car, then enlist someone to steer and brake the "dead car" while it was being towed. *See Titus v. Tangeman*, 101 N.Y.S. 1000, 1001 (N.Y. App. Div. 1906) (describing the tow of a disabled car with ten feet of rope). Yet unsophisticated rescue operations of this sort, it appears, caused as many problems as they solved, occasionally injuring the driver of the ominously-named dead car or unfortunate pedestrians. *See, e.g., id.* (woman injured while steering towed dead car); *Beaucage v. Mercer*, 92 N.E. 774, 775-76

(Mass. 1910) (same); *Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117, 118-19 (Utah 1916) (pedestrian tripped by towing rope); *Silverstein v. Schneider*, 164 A. 480, 481 (N.J. 1933) (pedestrian injured when tow rope broke and disabled car struck him). *See also Glasgow v. Dorn*, 220 S.W. 509, 510 (Mo. Ct. App. 1920); *Wilkowsky v. Grant Iron & Metal Co.*, 189 N.W. 10, 10-11 (Mich. 1922); *Tower v. Camp*, 130 A. 86, 86-87 (Conn. 1925).

Recognizing the perils of these early towing techniques, governments soon began regulating them. By the 1930s, towing operators in Detroit were required to use side safety chains, were required to limit the length of cables used to attach disabled vehicles and were barred from towing more than one vehicle at a time. *See Fraley v. J. Calvert's Sons*, 254 N.W. 167, 168 (Mich. 1934). At roughly the same time, Akron passed a similar regulation governing these and other towing requirements. *See Burns Motor Co. v. Briggs*, 160 N.E. 728, 729 (Ohio Ct. App. 1928).

During the late 1930s and 1940s, the development of the Ernest Holmes tow truck addressed many of these early problems. Equipped with stabilizing jacks, Manley cranes, strong cables and the classic "V" towbar, these tow trucks eventually became widespread and solved many of the equipment-related safety problems associated with the early tow truck. *See* Ron Kowalke, *Old Car Wrecks and the Vehicles at Accident Scenes, 1920s to 1960s* 24-27 (1997); Don Wood, *Half-Hour History of Tow Trucks*, 160 Special Interest Autos 54, 55 (July/Aug. 1997).

Even after the development of the commercially-produced tow truck, it did not take long for new safety problems to emerge. As American cities grew, so did traffic congestion within them, which led to more urban accidents caused by tow trucks that obstructed busy roads during the hook up or that moved more slowly than surrounding traffic and were not perceived by oncoming cars. *See Body, Fender & Brake*

Corp. v. Matter, 172 Va. 26, 28-29 (Va. 1939) (car crashes into tow truck attaching a disabled vehicle); *Gulf Brewing Co. v. Goodwin*, 135 S.W.2d 812, 815 (Tex. Civ. App. 1939) (vehicle strikes dead car that lacked a back light); *Engle v. Nelson*, 263 N.W. 505, 507 (Iowa 1935) (same); *Frame v. Arrow Towing Serv.*, 64 P.2d 1312, 1315 (Or. 1937) (cars crash while attempting to pass tow truck attaching a vehicle); *Fraley*, 254 N.W. at 164-68 (accident caused when car attempted to pass slow-moving tow truck).

These new safety issues of the 1930s and 1940s generated a new round of regulations. Chicago, for example, began regulating the speed of tow trucks and the back lighting of towed cars. *See Williams v. Consumers' Co.*, 185 N.E. 217, 219-220 (Ill. 1933). New York City banned tow trucks on the Hudson River Parkway except to move a disabled car to the next exit. *See People v. Mann*, 48 N.E.2d 274, 275 (N.Y. 1943). And to prevent towing-related "traffic congestion and the dangers incident thereto," Chattanooga enacted licensing and registration requirements for tow operators—a measure that has since been adopted by numerous cities and remains prevalent today. *See City of Chattanooga v. Fanburg*, 265 S.W.2d 15, 19 (Tenn. 1954).

Nor were cities alone in passing tow-safety laws. Some States in the middle of the last century did the same. *See, e.g., Frame*, 64 P.2d at 1315-16 (quoting Oregon law requiring tow-truck operators to "place at a suitable distance in each direction upon such roadway suitable signs or signals warning the drivers of oncoming vehicles of such operations"); *Anderson v. Robbins Incubator Co.*, 8 N.W.2d 446, 449 (Neb. 1943) (quoting Nebraska law requiring tow trucks to "be equipped with at least three portable flares which may be plainly visible for a distance of five hundred feet").

As tow trucks became an everyday part of the urban landscape, competition for the business grew, leading to new regulatory issues. Pursuing new business with a zeal that

would make even Ayn Rand blush, some tow operators began racing recklessly to accident scenes in the enterprising hope of securing new clients. Known then (and now) as "chasing," this sharp-elbowed practice became so widespread in the middle of the twentieth century that numerous cities enacted ordinances to combat it. Dallas for instance passed an ordinance prohibiting tow-truck operators from following police cars and ambulances to an accident or from soliciting business at the accident scene. *See City of Dallas v. Harris*, 157 S.W.2d 710, 710 (Tex. Civ. App. 1941). And one New Jersey city addressed the problem by requiring tow-truck operators to be of good moral character, denying towing licenses to individuals with criminal records. *See Librizzi v. Plunkett*, 16 A.2d 280, 281 (N.J. 1940).

By the 1950s, chasing was such a common practice that the Tennessee Supreme Court took judicial notice of it. "[M]ost cities the size of Chattanooga," the Court noted, "have police or shortwave radios over which reports are made and that wrecker operators and others have receiving sets or something of the kind in their cars where they obtain information about these wrecks and immediately rush to the scene of the accident which of course in many instances might create a hazard on the public streets." *See Fanburg*, 265 S.W.2d at 20. The then-leading treatise on municipal law devoted an entire section to the authority of cities to address this practice. *See* 7 *McQuillin on The Law of Municipal Corporations* § 24.628 (3d ed. 1949).

Despite decades of local efforts to regulate chasing and the safety risks that come with it, American cities still confront problems in this area. Over thirty years after it upheld the Dallas anti-chasing law, a Texas court revisited the issue in the context of a similar San Antonio ordinance:

> The not unusual situation was for several wreckers to appear at the scene of an accident, creating problems for officers who were attempting to restore the normal flow of

> traffic and seriously interfering with the efforts of police officers to investigate the accident and file the required reports. Wreckers were equipped with radios capable of monitoring the police frequencies. When the wreckers arrived on the scene of the accident they would engage in fiercely competitive efforts to induce the car owners to engage their services. The result was disorder and confusion at the scene of the accident.

Andrada v. City of San Antonio, 555 S.W.2d 488, 490 (Tex. Civ. App. 1977). Just a few months ago, the Fifth Circuit confirmed that chasing remains an essential police-power issue for cities in the twenty-first century. *See Stucky v. City of San Antonio*, 260 F.3d 424, 427 (5th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028); *see also Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 769 (2d Cir. 1999).

Nor are these the only safety problems that have required American cities to regulate local towing operations. To reduce their costs, towing companies increasingly demand cash-only payments from vehicle owners, store cars in desolate and unsafe parking facilities, and limit their hours of operation. The dangers associated with vehicle retrieval, a California court recently observed, were demonstrated by one individual

> who described his plight—and his concern for his safety—that ensued upon his return to a private parking lot one Saturday evening to find his car missing and no one in the parking lot . . . . [After determining that his car was not stolen,] Griffith took [a] taxi to the "tow yard" and, concerned about its location, asked the taxi driver to wait with him while he retrieved his car. Griffith went to the gate, and the person there said he could not let him in and that he had to wait. After some 20 minutes, Griffith "ran out of money" [and the taxi left] . . . . Griffith waited [alone outside] for another 45 minutes to an hour until [the tow

> operator] arrived. Griffith got out his credit card, to be expressly told that his credit card "won't be accepted."

People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870, 878 (Cal. Ct. App.), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). To remedy these safety problems, cities have passed ordinances requiring towing companies (1) to accept credit cards, cash or checks for the release of towed vehicles, (2) to stay open for extended hours, and (3) to notify the police after towing a vehicle from private property. *See, e.g., id.* at 874 (San Francisco ordinances); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1043 (9th Cir. 2000) (Santa Ana ordinances), *cert. denied*, 531 U.S. 1146 (2001).

Since its "invention" nearly one hundred years ago, automobile towing has caused numerous, varied and persistent safety problems. And since that time, cities understandably have sought to regulate this area by exercising the local police powers delegated to them by their respective state governments. Today, this legacy of safety regulation remains: *Every* major city in America has enacted ordinances addressing towing safety, from basic requirements governing the equipment used for towing and the qualifications of tow operators to regulations governing the manner in which tows and vehicle retrieval must be conducted. *See* Br. App. at D-1—D-2.

B. History Of Columbus Towing Regulations.

Columbus, Ohio, is no stranger to towing regulations of this sort. In 1972, the city first enacted tow-truck safety ordinances, which regulated tow equipment and required tow trucks to undergo annual safety inspections. *See* City of Columbus Wrecker Rules and Regulation, Pet. App. 48-A, and Wrecker Inspection Sheet (enumerating items to be inspected), Pet. App. 54-A. And like numerous other cities, it mandated that tow operators obtain a license, maintain liability insurance, and keep records of each vehicle towed. *See*

Columbus, Ohio, City Code §§ 549.02, 549.14, 549.15, 549.16, 549.17, and 549.18, Pet. App. 37-A—38-A, 44-A—47-A. Each of these requirements applies to tow-truck operators only when they pick up vehicles within the City of Columbus. *See id.* § 549.02 ("This section shall not apply . . . when the property being towed has been picked up outside of the City."), Pet. App. 37-A—38-A.

In 1975, Columbus added an anti-chasing provision to its regulations. Under this section, tow operators may not go to an accident site unless "summoned by a person having a direct interest in the vehicle . . . or dispatched thereto as provided in the rules and regulations promulgated by the [City] Safety Director." *Id.* § 549.065, Pet. App. 40-A.

Columbus, like all cities that have regulated this area, enacted these ordinances in accordance with authority delegated to it by the State. The Ohio Constitution grants municipalities within the State the general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." Ohio Const. art. XVIII, § 3. In addition, the Ohio legislature has enacted statutes that empower cities to regulate motor vehicles and highways. The Ohio Revised Code § 715.22, for example, provides that a municipality may regulate the use of vehicles and the transportation of articles upon its highways. And § 723.01 states that "municipal corporations shall have special power to regulate the use of the streets." Ohio likewise has exempted tow trucks from the State's regulation of motor carriers, *see* Ohio Rev. Code Ann. §§ 4921.02(A)(8) and 4923.02(A)(10), and leaves local tow-truck regulation largely to the cities. *See City of Cincinnati v. Reed*, 500 N.E.2d 333, 339 (Ohio Ct. App. 1985) (municipal towing regulations authorized by state law).

C. History Of Relevant Federal Statutes And Regulations.

1. History Of Interstate Regulation.

From the early days of the automobile until 1925, motor carriers were regulated (if at all) by state and local governments. In that year, however, the Supreme Court decided *Buck v. Kuykendall*, 267 U.S. 307, which permitted state and local governments to regulate only *intrastate* transportation, with one important exception. States and cities were permitted to continue regulating interstate *and* intrastate transportation "with a view to safety or to conservation of the highways [e.g., routing restrictions based on size and weight]." *Id.* at 315. The effect of *Buck v. Kuykendall* was to permit state and local governments to regulate the safety of motor carriers entirely but to allow them to enact economic regulations with respect only to intrastate traffic.

The conspicuous gap in the economic regulation of *interstate* transportation left by this decision was filled by the Federal Government in the mid-1930s, when it first began regulating motor carriers. Under the Motor Carrier Act of 1935, Pub. No. 255, 49 Stat. 543, the Federal Government empowered the Interstate Commerce Commission ("ICC") to regulate motor carriers engaged in interstate commerce. The Act preserved the States' exclusive regulatory authority—both economic and safety—over *intrastate* commerce by motor carriers. And although the Act allowed the ICC to establish *interstate* safety requirements (the first federal motor carrier safety regulations were promulgated in the late 1930s), the ICC relied heavily on state and local governments to regulate this area of safety as well. *See, e.g., Sharp v. Barnhart*, 117 F.2d 604, 607 (7th Cir. 1941) (federal regulation of interstate motor carriers "has not yet been extended to cover ordinary traffic safety regulations"). Absent a conflicting federal safety regulation on the same subject, state and local governments retained their safety regulatory authority over interstate motor

carriers, *see H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939) (emphasizing the importance of "local supervision of operation of motor vehicles"), as well as regulatory authority over the "size and weight of motor vehicles" on their highways. *See Maurer v. Hamilton*, 309 U.S. 598, 616 (1940).

Three years later, Congress in 1938 extended its economic regulation of interstate transportation to the aviation industry, creating the Civil Aeronautics Board to establish reasonable air-carrier rates. *See* Civil Aeronautics Act of 1938, Pub. No. 706, 52 Stat. 973. Unlike motor carriers, however, air carriers were not subject to state and local safety regulations. Rather, air transportation, whether intrastate or transoceanic, fell under the Federal Aviation Administration's safety regulatory authority. *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

Beginning in the late 1970s, Congress reversed course and began to eliminate federal economic regulations in the field of interstate transportation. In 1978, it passed the Airline Deregulation Act, which dismantled the Civil Aeronautics Board and its price-control measures. In order to prevent States from "undoing" this deregulation through their authority to set prices for *intrastate* air travel, Congress preempted States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. The regulation of all airline safety, however, remained under the jurisdiction of the FAA.

In 1980, with the passage of the Motor Carrier Act, Congress extended this deregulatory trend to the motor carrier industry. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. This Act eased federal economic restrictions on interstate trucking companies and eliminated anti-competitive route restrictions. A few years later, Congress enacted the

Motor Carrier Safety Act of 1984. The goal of this Act was to improve the safety of *interstate* trucks and buses and to increase compliance with traffic and safety laws. *See* Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, 98 Stat. 2832. Under the Act, state and local governments were allowed to continue regulating motor carrier safety with respect to *interstate* transportation, but these laws were subject to review by the Department of Transportation ("DOT"). *See* 49 U.S.C. §§ 31136, 31141 (authorizing the Secretary to establish regulations governing state and local laws with respect to interstate commercial motor vehicle safety); *see also* 49 C.F.R. § 355 (implementing these provisions).

2. History Of Intrastate Regulation.

In 1982, Congress sought for the first time to regulate the safety of commercial motor vehicles involved in *intrastate* activities by enacting the Motor Carrier Safety Assistance Program ("MCSAP"), a federal grant-in-aid program. *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097. As the program exists today, it allows DOT to review state and local safety laws applicable to intrastate motor carriers in every participating State to determine whether these laws are compatible with federal standards. *See* 49 U.S.C. § 31104(h); 49 C.F.R. § 350.335. Again, however, Congress left in place the authority of state and local governments to enact safety laws.

In 1994, Congress deregulated local price controls for intrastate motor carriers by enacting the Federal Aviation Administration Authorization Act ("FAAA Act"), Pub. L. No. 103-305, 108 Stat. 1569 (1994). This Act, which is at issue in today's case, regulated intrastate motor carrier services (such as towing or moving within a State) and the intrastate services of motor carriers associated with airlines (such as United Parcel Service). *See id.* § 601(a); H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755. Borrowing from predecessor legislation that deregulated price

control of air transportation, Congress preempted all state and local laws relating to "a price, route, or service" of any motor carrier and of any motor carrier affiliated with a direct air carrier. *See* H.R. Conf. Rep. No. 103-677, at 83. The point of this preemption was twofold: first, to put motor carrier companies that did not qualify as "air carriers" under the earlier Airline Deregulation Act (such as United Parcel Service), and thus were still subject to state regulation, on a level playing field with those that did qualify as air carriers (such as Federal Express); and second, to extend that same treatment to smaller, intrastate motor carriers by freeing them from local price controls and barriers to entry. *See id.* at 85-87. Consistent with its longstanding tradition of allowing state and local governments to regulate both interstate and intrastate motor vehicle safety, however, Congress excepted from preemption the "safety regulatory authority of a State." 49 U.S.C. § 14501(c)(2)(A).

D. History Of The Case.

Ours Garage and Wrecker Service, Inc. operates a towing company that provides services in Columbus, Ohio. In September 1998, its Columbus towing license expired, and the company failed to renew its license. Shortly thereafter, the city cited one of the company's drivers for failing to have a towing license. Pet. App. 37-A.

Rather than renew its license at that time, the company attempted to invalidate the underlying ordinance. On December 3, 1998, it sued the City of Columbus and two city officials in the United States District Court for the Southern District of Ohio, seeking a declaration that Columbus lacked authority to regulate these local safety issues. The Towing and Recovery Association of Ohio, a trade association of tow-truck operators, joined the suit and became a co-plaintiff. In their complaint, the two claimants alleged that 49 U.S.C. § 14501(c)(1) prohibits the City from regulating a wide variety of local towing operations. The City of Columbus responded

that, while this provision preempts state and local regulations "related to price, route or service of any motor carrier . . . with respect to the transportation of property," it is subject to several exceptions. And one of those exceptions, the City argued, applies here because it expressly preserves "the safety regulatory authority of a State with respect to motor vehicles."

The district court disagreed. On March 10, 2000, it granted summary judgment in favor of the plaintiffs, found Columbus's towing ordinances preempted, and enjoined the City from continuing to enforce its regulations in this area. *See* Pet. App. 34-A.

On June 19, 2001, the Sixth Circuit affirmed. *See Our Garage & Wrecker Serv. v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), Pet. App. 1-A—2-A. Relying on its prior decision in *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001), the court held that § 14501(c)(1) preempts all local towing regulations. Pet. App. 2-A. In *Petrey*, the court had concluded that a similar Toledo ordinance was not a *state* law and therefore was not a permissible safety regulation. *Petrey* noted that Congress specifically mentioned "political subdivisions" several times in § 14501, including in the preemption provision relevant here. Its failure to name "political subdivisions" in § 14501(c)(2)(A), *Petrey* concluded, signaled an intent to prohibit cities, as opposed to States, from enacting safety laws. *See* Pet. App. 23-A—24-A.

SUMMARY OF ARGUMENT

I.A. In preserving the "safety regulatory authority of a State" with respect to the intrastate regulation of motor carriers, Congress not only chose to remove safety regulations from the preemptive reach of § 14501(c)(1) but also preserved the traditional power of States to choose how, when and where that safety authority was exercised—whether through laws enacted by state legislatures, regulations promulgated by executive-branch state agencies, ordinances passed by local governments, or by some combination of the above. As

dictionary definitions and case law confirm, "regulatory authority" has a settled meaning denoting the power of an entity to act directly or to empower others to act on its behalf.

B. Any doubt about the meaning of the phrase is removed by the legal and historical background against which Congress enacted it. When the safety exception was passed in 1994, the discretion of States to delegate their police powers to local governments was as well known as it was widespread. And just three years before its enactment, this Court held that a reservation of authority to "State[s]" means that Congress left "the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation . . . in the hands of local authorities." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). That interpretation has particular relevance here given (1) the longstanding and prevalent regulation of towing operations by cities that preceded the passage of this law, and (2) the longstanding federal preservation of state and local authority over highway safety and route restrictions.

II.A. In reaching a contrary conclusion, the lower court first relied on *Russello v. United States*, 464 U.S. 16 (1983), which says that Congress's inclusion of a term in one part of a statute and its exclusion in another may be interpreted as deliberate. But this negative inference is designed to eliminate ambiguity, not to create it, and the absence of any uncertainty over the meaning of "safety regulatory authority of a State" makes the principle inapplicable here. The provisions of § 14501 that regulate "political subdivisions" by name, moreover, are sufficiently different from § 14501(c)(2)(A) in structure, syntax and function that *Russello*'s negative inference from the preservation of "the safety regulatory authority of a State" cannot be drawn. In all events, *Russello* establishes at best a contextual clue, but one the Court has never embraced when the resulting interpretation multiplies rather than diminishes the interpretive problems presented by a statute. Unless the safety exception is read to permit local regulation and

enforcement, no local authority, not even city police officers, would be authorized to *enforce* state safety laws against tow-truck operators. Similarly, the lower court's interpretation would render countless local size, weight and hazardous-materials route restrictions invalid and would render countless state laws in this area effectively unenforceable.

B. The Sixth Circuit's reliance on the legislative history and deregulatory function of the statute does not shore up these deficiencies. The court's single citation to the legislative history demonstrates only that Congress meant to eliminate price controls and barriers to entry in the intrastate motor carrier industry. This undisputed point, however, says nothing about the role of local safety regulations in Congress's statutory scheme, and indeed not one member of Congress during the 1994 debates over this exception said that the preemption provision would bar States from exercising their traditional prerogative of delegating safety authority to cities, counties and executive-branch agencies. And because the court of appeals' reading of the statute bars *aggregations* of States from enacting uniform safety laws, its interpretation hardly squares with the purported deregulatory objective of eliminating "another level of regulation." Pet. App. 28-A.

III. Nor should one lose sight of the end product of the decision below—namely, the interpretation of a federal law to bar state legislatures from distributing power to political subdivisions however they see fit, and to do so in an area of "intrastate" federal legislation no less. Whether in the context of federal laws that purport to establish qualifications for high-ranking state officials, that purport to expose state fiscs to money-damages actions or that purport to regulate other core state functions, the Court has not lightly imputed to Congress an intent to invade the traditional prerogatives of state government but has required such a policy to be expressly stated. Even the most modest respect for Federal-State comity, to say nothing of steering clear of unconstitutional constructions of federal laws, demands a rigorous presumption

against the interpretation of § 14501(c)(2)(A) embraced by the lower court. Whatever else may be said about the provision, it assuredly does not expressly prohibit state delegations of authority.

ARGUMENT

I. SECTION 14501(c)(2)(A) PERMITS STATE LEGISLATURES TO REGULATE TOWING SAFETY DIRECTLY OR TO DELEGATE IT TO OTHER POLITICAL SUBDIVISIONS.

A. The "Safety Regulatory Authority Of A State" Includes Local Safety Regulations Promulgated In Accordance With State Delegations Of Power.

The court of appeals' interpretation, as a preliminary matter, alters the customary meaning of the "safety regulatory authority of a State." By every conventional measure, the phrase includes the power of a state legislature to pass safety laws as well as the power of a state legislature to delegate law-making and law-enforcing power to state agencies, to state political subdivisions or to multi-state commissions.

First, dictionary definitions and common usage confirm this reading. "Regulatory" authority is authority that "relate[s] to regulation," *see Webster's Third New Int'l Dictionary* 1913 (1968) (defining "regulatory"), and "regulation" encompasses action "by an administrative agency or a local government . . . . agency regulation; subordinate legislation; delegated legislation." *Black's Law Dictionary* 1289 (7th ed. 1999) (defining "regulation"); *see also American Heritage Dictionary of the English Language* 1471 (4th ed. 2000) (defining "regulate" as "to control or *direct* by a rule, principle or method") (emphasis added). In preserving the "regulatory" power of the States over motor vehicle safety, Congress by definition preserved the States' power to delegate authority to other state-created entities and officials.

Second, before Congress enacted the safety exception in 1994, numerous judicial decisions reflected this usage of the phrase. Case after case uses "regulatory authority" to mean both a State's own legal authority to create laws *and* its power to delegate that authority to other political subdivisions or branches of government. *See Traweek v. City of San Francisco*, 920 F.2d 589, 593 (9th Cir. 1990); *Sproul v. City of Wooster*, 840 F.2d 1267, 1269 (6th Cir. 1988); *Wilson v. City of Seattle*, 863 P.2d 1336, 1337 (Wash. 1993); *Vonderhaar v. Parish of St. Tammany*, 633 So. 2d 217, 221 (La. Ct. App. 1993); *Bd. of County Comm'r v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1055 (Colo. 1992) (en banc); *Neb. Natural Gas Co. v. City of Lexington*, 93 N.W.2d 179, 180-81 (Neb. 1958); *Tsutras Automatic Phonograph Co. v. City of Williamson*, 51 S.E.2d 427, 429 (W.Va. 1949); *Del Balso Holding Corp. v. McKenzie*, 271 N.Y. 313, 316 (N.Y. 1936).

This Court has followed a similar path in using the phrase. It has often said that a State asserts "*regulatory authority* by enacting laws *and* . . . empower[ing] [subdivisions] to investigate and to establish rules to this end." *Sterling v. Constantin*, 287 U.S. 378, 397 (1932) (emphasis added); *see also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 12 (1942) ("[F]ederal regulatory authority" used to mean Federal Government's power to delegate authority to an agency). And it has specifically recognized that the "regulatory authority" of the States includes the States' power to enact laws and their authority to "delegate this power as they see fit," including to cities. *City of Newport v. Iacobucci*, 479 U.S. 92, 96 (1986).

B. *Mortier* Confirms This Settled Understanding.

Three years before Congress enacted this 1994 legislation, the Court removed any doubt regarding this understanding in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 598 (1991). At issue was the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, which

regulated pesticide use, sales and labeling and which expressly preserved the power of a "State" to "regulate the sale or use of any federally registered pesticide or device . . . to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v (1988). In construing this preservation of state power, the Supreme Court of Wisconsin (like the court of appeals here) held that FIFRA preempted *local* regulation of pesticides because the statute allowed only the *State* to enact pesticide-related laws.

This Court reversed. In doing so, it invoked the "well settled" principle "that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal citations and quotation omitted). It then reasoned that States so regularly act through their local governments that "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers." *Id.* at 608. FIFRA's grant of "regulatory authority to the States," the Court thus concluded, meant that Congress left "the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 607-08.

In view of *Mortier* and the time-honored assumptions upon which it rests, Congress no doubt meant "regulatory authority of a State" to permit state legislatures to enact appropriate laws on the topic or to delegate to other state-created entities the power to do so. For where "Congress thus employ[s] terminology that evokes a tradition of meaning, . . . [i]t may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978).

C. For More Than Two Centuries, The Delegation Of State Police Powers To Local Governments Has Been A Fixed Part Of The American Legal Landscape.

Not just *Mortier*, but two hundred years of history, confirm the clarity with which Congress spoke in preserving the "safety regulatory authority" of the States. State delegations of power, like Federal delegations of power, have a distinguished and indispensable pedigree in American government, and the Court has never lightly assumed that Congress would casually alter such an "accumulated legal tradition and meaning of centuries of practice." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Well before the passage of the safety exception in 1994, this Court had recognized the essential role that cities play in exercising the reserved powers of the States. They represent not only "convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them," *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), but also "a portion of its governmental power," *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 549 (1905). *See Bd. of Comm'rs of Tippecanoe Co. v. Lucas*, 93 U.S. 108, 114 (1876); *United States v. Baltimore & Ohio R.R. Co.*, 84 U.S. 322, 329 (1872) (cities are "representative not only of the State, but . . . a portion of its governmental power"); *Maryland v. Baltimore & Ohio R.R. Co.*, 44 U.S. 534, 550 (1845) (cities are "nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides."). Recognizing the advantages of dividing power into more convenient units of political authority, every State in the Union has delegated general police powers to cities in one way or another. *See* Br. App. at C-1—C-2.

This working assumption of American government has special application here because the regulation of motor vehicle safety has often been recognized as peculiarly suited for local control—particularly in States with large cities. *See* Chester J. Antieau & William J. Rich, 3 *Modern Constitutional Law* § 43.28 (2d ed. 1997); Charles J. Babbitt, *The Law Applied to Motor Vehicles* § 30 (4th ed. 1933); Xenophon P. Huddy, *Encyclopedia of Automobile Laws* § 68 (9th ed. 1932). "[L]ocalities," after all, "know the structure of their roads and regional traffic problems better than any national agency." Antieau & Rich, *supra*, at 62; *see also* cases discussed therein. And, indeed, "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of [the] highways . . . . [W]here traffic control and the use of highways are involved . . . great leeway is allowed local authorities." *Ry. Exp. Agency v. New York*, 336 U.S. 106, 111 (1949). Nor has this tradition eluded the regulation of intrastate towing operations. Every major city in the country has historically exercised, and continues to exercise, its delegated power to police local towing operations. *See supra* pp. 2-7; Br. App. at D-1—D-2.

This background informs and confirms the straightforward meaning of § 14501(c)(2)(A). When combined with *Mortier*'s teaching that an "express grant of regulatory authority to the States . . . . [means that] localities would still be free to regulate," 501 U.S. at 607, this history makes clear that Congress's preservation of the "safety regulatory authority of a State" encompasses a state legislature's power to delegate.

II. THE COURT OF APPEALS' CONTRARY ANALYSIS IS WRONG.

A. The Lower Court's Reliance On Congress's Specific Mention Of "Political Subdivisions" In Other Subsections Of § 14501 Was Misplaced.

Instead of starting its analysis by considering the clear, textual and historical meaning of "safety regulatory authority of a State," the court of appeals began by looking at its meaning in the context of other provisions of § 14501. In the court's view, the contrast between the specific mention of "political subdivision[s]" in subsection (c)(1) and its absence in subsection (c)(2)(A) could only be given content by reading the exception as applying solely to "State"-enacted safety regulations. *Petrey v. City of Toledo*, 246 F.3d 548, 561 (6th Cir. 2001). Relying on *Russello v. United States*, 464 U.S. 16 (1983), the court thus concluded: "Where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Petrey*, 246 F.3d at 561 (quoting *Russello*, 464 U.S. at 23). That principle of interpretation, however, does not support the lower court's analysis in this instance.

1. The *Russello* Principle Is Designed To Eliminate Ambiguity, Not To Create It.

The court of appeals initially erred by promoting *Russello* to an interpretive aid of first resort. Neither *Russello* nor any other precedent from this Court says that the inference applies in spite of, rather than because of, the existence of threshold ambiguity in a statute. As shown above, however, no such ambiguity exists. In the absence of any indication that the safety exception's coverage is uncertain in its terms, the lower court had no license to invoke the ambiguity-removing implications and inferences that *Russello* allows.

Put another way, the *Russello* principle serves to eliminate confusion, not to establish it in the first instance. Because the phrase at issue—"safety regulatory authority of a State"—has an accepted, plain, and unambiguous meaning, it was unnecessary to rely on any rule of construction (other than plain meaning) in this case. To do otherwise impermissibly raises "the negative pregnant" created by silence in one section of a statute (but not another) "to the level of interpretive trump card." *Field v. Mans*, 516 U.S. 59, 67 (1995). That violates a "cardinal" rule of interpretation. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotations and citations omitted). This error by itself requires reversal.

2. In 1994, Congress Had Legitimate Reasons For Mentioning Specific Political Bodies By Name In Some Sections Of § 14501 But Not In Others.

Even aside from the lower court's improper elevation of *Russello* to a primary (rather than a secondary) principle of statutory construction, the principle fails to advance respondent's argument on its own terms. Congress had ample reasons for mentioning "political subdivisions" by name in some parts of § 14501 and referring to the "regulatory authority of a State" in other sections of the statute. Accordingly, the contextual inferences at the core of this argument do not alter the chief inference in every statutory-interpretation case—that Congress meant what it said in preserving the "safety regulatory authority of a State." *See Germain*, 503 U.S. at 253-54; *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 & n.10 (1995) (declining to apply *Russello* where there were alternative explanations for congressional silence).

a. The Differences Between § 14501(c)(1) And § 14501(c)(2)(A) Have Several Legitimate Explanations.

As an initial matter, the distinctions between the wording of the preemption provision and the safety exception do not support the lower court's analysis. The preemption provision, it is true, refers to "a State, political subdivision of a State, or political authority of 2 or more States." 49 U.S.C. § 14501(c)(1). And the safety exception, it is true, refers to "the safety regulatory authority of a State." *Id.* at § 14501(c)(2)(A). But in focusing on the different references to political bodies in the two subsections, the court slighted other more illuminating distinctions between them and in the end overlooked legitimate explanations for wording the provisions differently.

For one, the structure of the pertinent sentences is not parallel and accordingly precludes the inference that state legislatures alone may enact safety regulations. To make the *Russello* inference applicable, the preemption provision would need to apply to "the regulatory authority of a State, the regulatory authority of a political subdivision of State, or the regulatory authority of 2 or more States." In the absence of that predicate similarity in sentence structure, however, no reason exists for ignoring the customary meaning of "regulatory authority of a State" in the safety exception. *See Mortier*, 501 U.S. at 608-09 (refusing to interpret the word "State" to preclude delegations to political subdivisions merely because related provisions specified the role of "States" and "political subdivisions").

For another, when Congress drew these distinctions in 1994, it made sense to specify what States, political subdivisions and combinations of States *could not do*, while leaving it to the "safety regulatory authority of a State" to decide what they *could do* when it comes to safety regulations. In specifying the political entities preempted from enacting

and enforcing certain laws, rather than simply proscribing the "State" from doing so, Congress wisely clarified in belt-and-suspender terms the breadth of preemption. But in identifying areas not covered by the preemption provision, it respectfully left it to the States to decide for themselves what aggregations or divisions of state political authority they would allow to regulate the area. That made particular sense here in view of Congress's tradition since 1935 of generally preserving state and local authority over motor vehicle safety and its more recent practice of delegating to DOT the power to review state and local safety regulations to ensure that they do not unduly interfere with interstate commerce or other federal policies. *See supra* pp. 8-12; 49 U.S.C. §§ 31104(h), 31136, 31141; 49 C.F.R. §§ 350.335, 355.

Nor is it unusual to enumerate the political entities that are preempted from enacting a certain law, then to vest regulatory authority in each State to decide which subsidiary political bodies may benefit from an exemption to the rule. It will often be the case that a general ban enumerates those covered by it, while delegating to another authority the power to establish and implement exceptions to the ban. For example, the Secretary of the Army may enact a general rule banning all on-duty card playing by general, lieutenants, captains and other members of the armed services. But the Secretary does not undercut that rule by empowering generals to decide what is "off duty" or to delegate that decision to others. As every soldier knows and as every lawyer eventually learns, allocations of power in a hierarchical system are not necessarily symmetric.

b. The Other Provisions Of § 14501 That Mention "Political Subdivisions" Do Not Alter This Analysis.

In reaching its conclusion, the court of appeals also relied on three other provisions of § 14501 that mention "political subdivisions" by name. That, too, was incorrect.

Two of these provisions—§ 14501(c)(2)(C) and § 14501(a)(1)—were not even enacted in 1994. Congress enacted the first of these provisions in 1995 and the second of them in 1998. *See* Br. App. at B-10—B-14. As the Court has instructed, "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilve v. United States*, 519 U.S. 79, 89 (1996). The lower court did not heed this requirement here.

That leaves the third provision—§ 14501(c)(3). To be sure, it was enacted as part of the 1994 legislation, and it specifies that the preemption provision does not affect "any authority . . . of a political subdivision of a State" to enact regulations regarding traditional state commercial-transportation rules, such as uniform cargo-liability and bill-of-lading rules. 49 U.S.C. § 14501(c)(3)(A). But a full reading of the subsection indicates that it was designed to give power to motor carriers, not to States or cities. All of the commercial transportation rules preserved by this provision, it turns out, "only appl[y] to a [motor] carrier upon request of such carrier." 49 U.S.C. § 14501(c)(3)(B)(ii). Under these circumstances, it made sense to enumerate each of the types of laws or regulations (along with the political bodies enacting them) that a motor carrier might opt to make applicable to it. In the absence of this clarification, the reader could easily infer that motor carriers were permitted to make this choice solely on a State-by-State basis, not on a city-by-city basis. That consideration alone explains why Congress would enumerate "political subdivisions" in subsection (c)(3)(A) and why it would not do so in the safety exception, which was designed to preserve the power of States, not motor carriers. *See Martin v. Hadix*, 527 U.S. 343, 356-57 (1999) (a negative inference does not apply where two statutory sections address different issues and have different overarching goals).

In the final analysis, the differences between the provision preserving the "safety regulatory authority of a State" and the provisions mentioning "political subdivisions" make *Russello*

inapplicable. The provisions are not only dissimilar in structure and history but also in purpose. *See Mortier*, 501 U.S. at 612 ("The scattered mention of political subdivisions elsewhere in [the statute] does not require their exclusion here.").

3. The Court Of Appeals' Application Of *Russello* Creates More Interpretive Problems Than It Solves.

Just as the *Russello* inference does not apply where alternative explanations exist for including words in one part of a statute but not in another, it also does not apply where the inference leads to an "odd" interpretation to which "common sense would balk." *Field*, 516 U.S. at 67-68; *see also Mortier*, 501 U.S. at 608 (declining to adopt narrow interpretation of "State" premised on the treatment of political subdivisions elsewhere in the statute because of the "anomalous result" that would occur). That limitation on *Russello* also applies here.

a. The Decision Below Undermines The *Enforcement* Of All Safety Laws.

Application of *Russello* here leads to several "common sense" problems. As an initial matter, it would dramatically undermine the *enforcement* of all *state* safety laws. The preemption provision, recall, specifies that no State or subdivision may "enact or *enforce*" any towing laws. *See* 49 U.S.C. § 14501(c)(1) (emphasis added). If, as the Sixth Circuit held, the safety exception reinstates only the *State's* authority to "enact" and "*enforce*" safety laws (and preempts any delegation of that authority to local governments), state safety laws could never be enforced by cities. That would mean only state troopers, but not city or county police officers, could issue tickets or make arrests for a violation of the State's towing and other intrastate motor vehicle laws. This would come as a great surprise to the States, as most law-enforcement authority (including authority to enforce state laws) is exercised by county and city police officials and, in

the end, would lead to the practical unenforceability of the very safety regulations that the statute explicitly excepted from federal preemption. That of course is not what Congress had in mind—particularly since it elsewhere affirmatively stated that its intention was "to promote *safe* . . . transportation." 49 U.S.C. § 13101(a)(1)(B) (emphasis added).

b. The Decision Below Undermines Local Size, Weight And Hazardous-Materials Route Regulations.

The lower court's narrow reading of "regulatory authority of a State" also undercuts other state powers specifically and historically preserved from preemption. Section 14501(c)(2)(A) not only makes an exception for "the safety regulatory authority of a State" but also saves "the authority of a *State* to impose highway *route* controls or limitations based on the *size* or *weight* of the motor vehicle or the *hazardous nature* of the cargo." *Id.* (emphasis added). Assuming that the phrase "authority of a State" means the same thing throughout the sentence that makes up § 14501(c)(2)(A), *see Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000), it would follow that the provision saves only a State's, but not a city's, ability to enact size, weight, and hazardous-material route restrictions on motor vehicles.

This reading of the provision would have a distorting effect on traditional law-enforcement practices in this area as well. To our knowledge, *every* local government in the country purports to limit the size and weight of trucks and cars that may enter city or state highways or pass on bridges, and many cities regulate the hazardous cargo that may be carried on their roads. *See, e.g.*, Arlington, Va., County Code of Ord. §§ 14.2-53(e), 14.2-57; Tucson, Ariz., Code § 13-15; Houston, Tex., Code § 45-58; Fort Wayne, Ind., Code ch. 75.02; N.Y., N.Y., Rules & Reg. § 4-15(h); Concord, N.H., Code art. 5-3-2; Des Moines, Iowa, Code § 114-460.03; Fremont, Cal., Code § 3-

2707; Knoxville, Tenn., Code § 17-419; Manhattan, Kan., Code § 31-1; Scottsdale, Ariz., Code § 17-61.

Yet no other exception in § 14501(c)(2) allows these classically-local restrictions. Only a state legislature willing to examine every street in every municipality, then to enact routing rules appropriate to each, would be able to restrict the routes of motor carriers on these bases. And that of course would solve only the "enact[ment]" problem. "Enforc[ing]" these laws, as shown above, would present still another challenge—ultimately requiring hapless state troopers to take control of enforcing each of these quintessentially local laws.

Nor is this risk a contrived one. A federal district court recently reached this exact conclusion. *See Cal. Dump Truck Owners Ass'n v. Davis*, 172 F. Supp. 2d 1298, 1303-04 (E.D. Cal. 2001). Applying the same logic as the court of appeals in this case, the court reasoned that § 14501(c)(2)(A) preserves only a *State*'s ability to impose restrictions on motor carriers, then held all state statutes purporting to delegate this authority preempted and ultimately invalidated *all* local traffic-control laws as applied to intrastate motor carriers. *Id.* Under this reasoning, which follows the trajectory of the lower court's analysis in this case, even municipal one-way-street laws would be preempted.

In the end, no legislature intent on preserving the "safety regulatory authority of a State" would erect such an administratively awkward and ultimately counter-productive regime. And the National Legislature deserves more credit than to have compelled it.

c. The Decision Below Undermines The Federal Government's Own Assessment Of The Cooperative Federal, State And Local Authority That Exists In This Area.

Several other indicators of statutory meaning make the *Russello* principle inapplicable. **First**, the lower court's state-

law-only reading of the safety exception cannot be squared with the statutory findings that Congress made in enacting the law in 1994. In pertinent part, they provide:

> (a) FINDINGS.—Congress finds and declares that—
>
> (1) The *regulation of intrastate transportation of property by the States* has—
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> ***
>
> (2) certain aspects of the *State regulatory process* should be preempted.

FAAA Act, Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis added). As Congress demonstrated in making these statutory findings, a federal effort to place limitations on the "States" and "the State regulatory process" generally covers the activities of all state-created entities, not just state legislatures. Under the court of appeals' application of *Russello*, however, the purpose of the 1994 legislation was only to address intrastate laws enacted by States in this area, not those promulgated by cities. Yet no court to our knowledge has ever embraced that view.

Second, the lower court's interpretation is at odds with DOT's extant power to review state *and* local safety laws. For some time, Congress has vested DOT with authority to review state and local safety laws affecting interstate and intrastate commerce. *See, e.g.*, 49 U.S.C. §§ 31104(h), 31136, 31141, 49 C.F.R. §§ 350.335, 355. Under these provisions, DOT has broad powers to preempt and approve state *and* local safety laws that are incompatible with other federal laws. Needless to say, it would be a strange statutory regime that gave DOT power to review a type of local power (*e.g.*, city ordinances) that could not be exercised in the first instance. *See Mortier*, 501 U.S. at 608-09.

Third, when it comes to local regulation of hazardous materials, the decision below again is inconsistent with Congress's and DOT's own understandings. In other parts of Title 49, Congress has indicated that the "authority of a State" with respect to hazardous materials includes the State's discretion to delegate its authority to political subdivisions. *See* 49 U.S.C. §§ 5112(a)(2) (reserving to "each State" certain authority to establish highway routing controls or limitations for hazardous materials); *id.* § 5112(b)(1)(H) (contemplating State delegation of that authority by mandating regulations that require each State to ensure "*political subdivisions of the State* comply with standards prescribed under this subsection in establishing . . a highway routing designation . . .") (emphasis added).

DOT has a similar view. Several of its regulations intimate (and in some instances explicitly state) that local ordinances are permitted when it comes to the transportation of hazardous materials. *See, e.g.*, 49 C.F.R. § 397.3 (requiring every motor vehicle containing hazardous materials to be driven "in compliance with the laws, *ordinances*, and regulations of the jurisdiction in which it is being operated" unless they are at variance with a specific and more stringent federal regulation); *id.* § 397.69 ("[A]ny highway routing designation affecting the highway transportation of NRHM [non-radioactive hazardous material], *made by a political subdivision of a State is considered as one made by that State* . . . .") (emphasis added); *id.* § 397.71 ("If a State or any political subdivision thereof, . . . chooses to establish, maintain, or enforce any NRHM routing designation, the Governor . . . shall designate a routing agency for the State . . . [to] ensure that all NRHM routing designations within its jurisdiction comply with the Federal standards in this section."). *Accord* Fed. Motor Carrier Safety Admin., Dep't of Transp., *Cleveland, Ohio Requirements for Transportation of Hazardous Materials*, 66 Fed. Reg. 29,867, 29,871 (June 1, 2001) (ruling that a Cleveland, Ohio hazardous-materials ordinance restricting access to the

downtown area during the busiest times of the work week was not preempted by federal hazardous material transportation law except with respect to certain materials used by hospitals).

Fourth, DOT has issued an interpretive guideline regarding the application of §14501 to tow trucks that is inconsistent with the lower court's decision. Entitled *Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305*, the pamphlet contains a section that addresses "Tow Truck Operations" and that assumes Congress meant to permit local safety regulations. It says that "State actions that are legitimately grounded in public safety considerations are exempt from Title VI. For example, we believe that State *or local* regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption." Br. App. at E-5 (emphasis added). In addition, DOT has issued an interpretive notice, which provides that under § 14501(c)(2)(A) "State *and local governments* are able to regulate freight forwarders of property with respect to motor vehicle *safety*, financial responsibility, and other State standard transportation practices." Fed. Highway Admin., Dep't of Transp., *General Jurisdiction Over Freight Forwarder Service*, 62 Fed. Reg. 4096, 4099 (Jan. 28, 1997) (emphasis added). These agency interpretations of § 14501(c)(2)(A) are consistent and reasonable and therefore "merit some deference." *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2175 (2001). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In the final analysis, the City of Columbus's reading of the statute respects not only the terms and general structure of § 14501 but also Congress's and DOT's own understanding of what those provisions mean. That consistent understanding should be followed here.

B. The Deregulatory Function Of The Statute Is Not Advanced By The Court Of Appeals' Decision.

Neither does the deregulatory objective of the statute support the decision of the court of appeals. In its view, "one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations, thus indicating that yet another level of regulation at the local level would be disfavored." *Petrey*, 246 F.3d at 563; Pet. App. 28-A. Yet even this highly-generalized objective is not necessarily advanced by the lower court's interpretation.

Far from ensuring that "another level of regulation" would be eliminated, the lower court's interpretation in one respect does just the opposite. If, as the court of appeals held, Congress's failure to reference a "political subdivision of a State" in subsection (c)(2)(A) means that such bodies may not pass towing safety regulations, it follows that Congress's failure to name the "political authority of 2 or more States" in the safety exception means that States may not aggregate their power to create regional safety rules for their streets and byways. That interpretation of the exception, however, cannot co-exist with the deregulatory objective that supposedly animated it. A prohibition that bars States from aggregating their "safety regulatory authority" ultimately would expand, rather than limit, the potential number of motor carrier safety regulations.

C. The Legislative History Does Not Advance The Court Of Appeals' Analysis.

The court of appeals also believed that the legislative history supports its reading of the statute. Pet. App. 28-A. That, too, is wrong.

In reaching this conclusion, the court of appeals quoted the following statement from the Conference Report:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets . . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers.

Petrey, 246 F.3d at 563 (quoting H.R. Conf. Rep. No. 103-677, at 87 (emphasis added)). This statement simply does not bear the weight the court placed on it.

The quoted language, to begin with, conspicuously uses "State economic regulation" to refer to State *and* city regulations. Indeed, throughout the Conference Report, "State" is used in this fashion. *See* H.R. Conf. Rep. No. 103-677 at 83-88. That nomenclature of course advances rather than undercuts the City's position.

In addition, this passage says nothing about local safety regulations. It says only that § 14501(c) was intended to eliminate complex "economic regulations," and Congress was careful in the paragraphs proceeding it to distinguish *economic* regulations from *safety* laws: the former were preempted while the latter were not. *See id.* at 83-85. With respect to safety laws, the Report states that they would not be preempted because § 14501(c)(2)(A) left safety regulatory authority "unaffected" and "unchanged" and allowed governments to "continue to exercise" their safety regulatory authority. *Id.* at 84, 85 Consistent with maintaining the *status quo* in this area, the Conference Report provides that the safety exception was intended to describe the *kind* of existing laws that were excepted from preemption, not the political entities allowed to pass these laws. *See id.* at 84-85. It thus characterizes § 14501(c)(2) as specifying "some of the matters" that are excepted from preemption and stresses that its purpose is to describe "those areas" that are excepted from

preemption, not to limit the States' traditional methods of regulating the area. *Id.* at 84.

Beyond these affirmative statements, the cited Conference Report is perhaps most notable for its silence. It contains *no* statement suggesting that Congress intended to alter the traditional role of municipalities in the regulation of motor vehicle safety. Nowhere in the FAAA Act's history does any committee, senator or representative even casually suggest a desire to circumscribe the traditional power of state governments to delegate safety authority. Since such a change would have represented a dramatic departure from existing practice (and over a matter of "intrastate" transportation at that), the failure to mention the topic suggests that Congress had no such purpose in mind. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489-90 (1985).

III. THE SAFETY EXCEPTION SHOULD BE READ TO PRESERVE RATHER THAN TO ALTER THE BALANCE BETWEEN THE FEDERAL GOVERNMENT AND THE STATES.

One other point deserves comment. This is not an ordinary statutory-interpretation case and the court of appeals' decision has led to anything but an ordinary result. It is one thing for Congress to exercise its powers in a given *substantive* area, then to preempt all contrary state laws. But it is quite another to permit state regulation of a given substantive area, then to dictate the state *processes* for legislating there. The Supremacy Clause generally permits the former exercise of federal power, while the Tenth Amendment generally proscribes the latter. *See New York v. United States*, 505 U.S. 144, 178 (1992) ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation."); *Printz v.*

United States, 521 U.S. 898, 924 (1997) ("Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.") (internal quotations and citations omitted).

As interpreted by the court of appeals, § 14501 has been transformed from a run-of-the-mill law about the subject-matter scope of federal preemption into an entangling directive about the branches of state government allowed to do their job. That is not the way Congress typically legislates, and still less does it do so when regulating an "intrastate" activity. From the perspective of the States, it would be no less strange had Congress told the States where their legislatures must meet, dictated whether their legislatures should be bicameral or unicameral, or limited the authority of executive-branch agencies to implement state laws. The Court historically has resisted interpretations of federal law that make incursions on such state prerogatives—in the absence of unequivocal direction from the National Legislature. It should do the same here.

A. The Clear-Statement Doctrine Applies Here.

Rooted in Federal-State comity, constitutional avoidance and constitutional imperative, the clear-statement rule has been invoked in a wide range of settings affecting core areas of state government. The Court has applied the rule in construing federal statutes to regulate private individuals, but not States. *See, e.g., Employees of the Dep't of Pub. Health & Welfare v. Mo. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). It has applied the rule in deciding whether federal law exposes the States to money-damages actions. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). And it has applied the rule in determining whether Congress meant to regulate the qualifications of high-

ranking state officials. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Throughout, the Court has offered two basic explanations for this presumption against federal regulation of core state functions. The rule first ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved" in the interpretation of the statute. *United States v. Bass*, 404 U.S. 336, 349 (1971). That requirement follows from the explanation for allowing Congress to regulate core state functions at all. Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Constitution permits Congress to regulate the States only because they are presumed to be able and willing to protect their self-interest through their representatives in Congress. But "[t]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (citing L. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)).

The rule also serves constitutional-avoidance objectives by precluding premature resolutions of knotty constitutional questions. "[O]ut of respect for Congress," the Court "assume[s]" that Congress "legislates in the light of constitutional limitations" and would not wish to trigger judicial debates about the relative powers of the States and the Federal Government—until Congress first has considered the question, then expressly passed a law compelling the Third Branch to agree or disagree with its assertion of authority. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (quotation omitted); *see also INS v. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279 (2001); *Gregory*, 501 U.S. at 464.

Doubtless this rule and each of its functions apply here. The Court has repeatedly acknowledged that States have great discretion, if not absolute discretion, over how they distribute and allocate governmental power. *See Hunter*, 207 U.S. at

178-79. And the Court has long recognized the extraordinarily wide latitude that States have to create local governments and delegate powers to them. *See Sailors v. Bd. of Educ.*, 387 U.S. 105, 107-08 (1967). Indeed, the power of a State to organize itself is "a decision of *the most fundamental sort* for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State *defines itself* as a sovereign." *Gregory*, 501 U.S. at 460 (emphasis added). This foundational authority parallels the uncontested power of a State to vest a city with the attributes and power of a state capitol. *See Coyle v. Smith*, 221 U.S. 559 (1911). And just as the Tenth Amendment prevents Congress from limiting a State's discretion to name a capitol city, *see id.* at 574-75, it also generally bars Congress from telling a State how to organize and distribute its police powers. *See Gregory*, 501 U.S. at 460; *Sailors*, 387 U.S. at 107-08. If the clear-statement requirement does not apply in the face of these constitutional imperatives, it is not clear where it would apply.

B. Congress Has Not Satisfied The Clear-Statement Requirement Here.

Whether stated as an "unmistakably clear" requirement, *Gregory*, 501 U.S. at 460-61 (quotation omitted), as an "unequivocal and textual" requirement, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), or merely as a "clear statement" rule, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation omitted), the point is the same: Congress must leave no doubt about its intentions to regulate core state functions. In this instance, Congress did no such thing.

In preserving the "safety regulatory authority of a State" with respect to intrastate transportation, Congress did not expressly prohibit States from delegating that authority to local subdivisions. The exception says nothing *at all* about local governments or delegations of authority. And it fails to name *any* actor that is allowed to exercise regulatory authority.

Instead, it preserves a *kind* of authority and leaves open the question of who may exercise it. This ambiguity alone precludes the reading of the safety exception adopted by the court of appeals, and no amount of inferences from statutory silence may overcome this presumption. So long as a law is "susceptible of" an interpretation that does not infringe an historically-respected state prerogative—which assuredly is the case here—that is enough to defeat an alternative reading of the law. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). *See also Gregory*, 501 U.S. at 467; *cf. Mortier*, 501 U.S. at 607-08 ("The exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of [this] very entity. . . . [the more plausible reading of States is thus that it] leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."). On this basis alone, the lower court's decision should be reversed.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street
Suite 200
Columbus, Ohio 43215

JEFFREY S. SUTTON
(*Counsel of Record*)
TRACI L. LOVITT
RONALD E. LAYMON
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

February 2002

APPENDIX A

FULL TEXT OF 49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

(a) Motor carriers of passengers.—

(1) Limitation on State law.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to—

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) Matters not covered.—Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) Freight forwarders and brokers.—

(1) General rule.—Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's authority.—Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor carriers of property.—

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.—

(A) Continuation.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a

provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.—This subsection shall not apply with respect to the State of Hawaii.

APPENDIX B

HISTORY OF 49 U.S.C. § 14501's TEXT

I. THE PRE-AMENDED VERSION OF 49 U.S.C. § 11501.

The current version of 49 U.S.C. § 14501 has its origins in 49 U.S.C. § 11501. In 1991, before any of the provisions at issue here were passed, § 11501 read as follows:

§ 11501. Interstate Commerce Commission authority over intrastate transportation.

(a) The Interstate Commerce Commission shall prescribe the rate, classification, rule, or practice for transportation or service provided by a household goods freight forwarder subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes--

(1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or

(2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this

subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to

be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when--

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title--

(A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and

(B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that--

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in

one State imposes an unreasonable burden on interstate commerce if the Commission finds--

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action

on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

(g) Preemption of State regulation of freight forwarders.--

(1) General rule.--Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to interstate rates, interstate routes, or interstate services of any freight forwarder.

(2) Continuation of Hawaii's authority.--Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

II. THE 1994 ADDITION OF THE PREEMPTION PROVISION AND THE SAFETY EXCEPTION UNDER THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT ("FAAA ACT").

A. Transportation By Motor Carriers.

In 1994, the FAAA Act, Pub. L. No. 103-305, 108 Stat. 1569 (1994), amended 49 U.S.C. § 11501 to add, as subsection (h), the preemption provision and safety exception at issue here. The then-new subsection (h) read as follows:

(h) Preemption of State economic regulation of motor carriers.--

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(B) does not apply to the transportation of household goods.

(3) State standard transportation practices.--

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules, or

(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides,

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

B. Transportation By Air Carriers Or Carrier Affiliated With A Direct Air Carrier.

The FAAA Act also amended the Airline Deregulation Act, specifically 49 U.S.C. § 41713(b), to add a nearly identical preemption provision and safety exception for air carriers and carriers affiliated with direct air carriers:

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.----

(A) General rule.--Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by

aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.--Subparagraph (A)--

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

III. THE 1995 RENUMBERING OF § 11501 AND THE ADDITION OF THE NON-CONSENSUAL TOW EXCEPTION UNDER THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT ("ICCTA").

In 1995, Congress passed the ICCTA, *see* Pub. L. 104-88, 109 Stat. 803 (1995). As is relevant here, the ICCTA renumbered portions of 49 U.S.C. § 11501, including the preemption provision and safety exception, and added a non-consensual towing exception to preemption. After it was revised, 49 U.S.C. § 14051 read as follows:

§ 14501. Federal authority over intrastate transportation

(a) Motor Carriers of Passengers.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this

title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not Apply to intrastate commuter bus operations.

(b) Freight Forwarders and Brokers. --

(1) General Rule.--Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's Authority. --Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor Carriers of Property.--

(1) General Rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters Not Covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size

or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not Apply to the transportation of household goods; and

(C) does not Apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State Standard Transportation Practices. --

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only Applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.--This subsection shall not Apply with respect to the State of Hawaii.

IV. THE ADDITION OF A SAFETY EXCEPTION TO MOTOR CARRIERS OF PASSENGERS IN 1998.

The final amendments to § 14501 occurred in 1998. Under the Transportation Equity Act of 1998, Pub. L. 105-178, 112 Stat. 107 (1998), Congress made revisions to the organization of § 14501(a) and added a safety exception to it. In addition, Congress subsequently made a minor change to the provision to clarify the preservation of Hawaii's laws regarding intrastate bus transportation. In light of these amendments, § 14501(a) now reads:

(a) Motor carriers of passengers.--

(1) Limitation on State law.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to--

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) Matters not covered.--Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

APPENDIX C

STATE DELEGATIONS OF POWER TO MUNICIPALITIES

ALA. CODE § 11-45-1 (1975)
ALASKA CONST. art. X, § 11
ARIZ. CONST. art. XIII, § 2
ARK. CODE ANN. § 14-55-102 (1987)
CAL. CONST. ART XI, § 7
COLO. CONST. ART. XX, § 6
CONN. GEN. STAT. ANN. § 7-148 (WEST 2001)
DEL. CODE. ANN. TIT. 22, § 802 (2000)
FLA. CONST. ART. VIII, § 2
GA. CODE ANN. 36-34-1
HAW. CONST. ART. VIII, § 2
IDAHO CONST. ART. XII, § 2
65 ILL. COMP. STAT. ANN. 5/11-1-1 (WEST 2001)
IND. CODE § 36-1-3-2 (1997)
IOWA CONST. ART. III, § 38A
KAN. CONST. ART. 12, §5
KY. REV. STAT. ANN. § 82.082 (BANKS-BALDWIN 2001)
LA. CONST. ART. 6, § 5
ME. CONST. ART. VIII, PART 2, § 1
MD. CONST. ART. XI-E, § 3
MASS. CONST. ART. II, § 6
MICH. CONST. ART. VII, § 21
MINN. STAT. § 410.04 (2000)
MINN. STAT. § 410.19 (2000)
MISS. CODE ANN. § 21-17-5 (2001)
MO. CONST. ART. 6, § 19
MONT. CONST. ART. XI, § 6
NEB. CONST. ART. XI, §§ 2-4
NEV. REV. STAT. ANN. 266.010 (2001)
N.H. REV. STAT. ANN. § 31.39
N.J. STAT. ANN. § 40:69A-30 (2001)
N.M. CONST. ART. X, § 6

N.Y. CONST. ART. IX, § 2
N.C. CONST. ART. VII, §1
N.D. CONST. ART. 7, § 1
OHIO CONST. ART. XVIII, § 3
OKLA. CONST. ART. XVIII, § 3A
OR. CONST. ART XI, § 2
PA. CONST. ART. 9, § 2
R.I. CONST. ART. XIII, § 2
S.C. CONST. ART. VIII, § 17
S.D. CONST. ART. IX, § 2
TENN. CONST. ART. XI, § 9
TEX. CONST. ART. XI, § 5
UTAH CONST. ART. XI, § 5
VT. STAT. ANN. TIT. 24, § 2291 (1999)
VA. CODE ANN. § 15.2-1102 (1997)
WASH. CONST. ART. XI, § 11
W. VA. CONST. ART. VI, § 39
WISC. CONST. ART. XI, § 3
WYO. CONST. ART. 13, § 1

APPENDIX D

MUNICIPAL TOWING REGULATIONS IN ORDER OF CITY SIZE

NEW YORK, N.Y., ADMIN. CODE §§ 20-495–20-498, 20-504–20-528

L.A. COUNTY, CAL., CODE § 7.28.020

CHICAGO, ILL., MUN. CODE §§ 9-44-010–9-44-060

D.C., MUN. REG. §§ 16-401–16-409

BALTIMORE, MD., COUNTY CODE §§ 24-226–24-230

SAN FRANCISCO, CAL., POLICE CODE §§ 3000–3013

PHILA., PA., CITY CODE § 9-605

DETROIT, MICH., CITY CODE §§ 55-1-10–55-1-17

DALLAS, TEX., CITY CODE § 48A

HOUSTON, TEX., CODE §§ 8-124–8-129, 8-134, 8-143–8-153, 8-161–8-168, 8-177–8-179, 8-181–8-190, 8-210–8-216

ATLANTA, GA., CITY CODE §§ 162-221–162-234

MIAMI, FLA., CITY CODE §§ 42-103–42-111

SEATTLE, WASH., MUN. CODE §§ 6.214.040–6.214.070

PHOENIX, ARIZ., CODE §§ 36-6–36-8

MINNEAPOLIS, MINN., CODE OF ORD. §§ 349.10–349.100

ST. LOUIS COUNTY, MO., REVENUE ORD. §§ 813.070–813.080

DENVER, COLO., REV. MUN. CODE § 55-179–55-193

PITTSBURGH, PA., CODE §§ 523.02–523.07, 525

TAMPA, FLA., CODE OF ORD. §§ 6-230–6-234, 14-48

PORTLAND, OR., CODE § 14.36.040

CINCINNATI, OHIO, MUN. CODE § 869-7

KANSAS CITY, MO., CODE OF ORD. § 70-399, 70-908, 76-281–76-288

SACRAMENTO, CAL., CODE §§ 5.144.010–5.144.090

MILWAUKEE, WIS., COUNTY CODE APP. C § 23

SAN ANTONIO, TEX., CODE § 19-391

INDIANAPOLIS, IND., CODE §§ 611-206–611-214

LAS VEGAS, NEV., PARKING CODE § 11.55.080

SAN JOSE, CAL., MUN. CODE § 6.66

SANTA ANA, CAL., MUN. CODE §§ 32-81–32-107

MYRTLE BEACH, FLA., CITY CODE § 23-133

APPENDIX E

DEPARTMENT OF TRANSPORTATION
INTERPRETIVE GUIDELINE AND COVER LETTER

U.S. Department of Transportation
Office of the Secretary of Transportation

400 Seventh St. S.W.
Washington, D.C. 20680

GENERAL COUNSEL

March 9, 1995

Mr. Larry Cernosek
Chairman
Texas Towing and Storage Association
2104 Lyons Ave.
Houston, Texas 77020

Dear Mr. Cernosek:

Thank you for your letter requesting opinions on several questions relating to the legality of tow truck regulations in Texas. Your letter, which was addressed to Assistant Secretary Frank E. Kreusi, was referred to me for reply.

The Department of Transportation (DOT) has received many inquiries on the interpretation and effect of the preemption provisions of Title VI of the Federal Aviation Administration Authorization Act of 1994, as has the Interstate Commerce Commission (ICC). Unfortunately, because of the limited resources we have, we are not in position to address every such inquiry individually.

However, we have prepared some materials that summarize and interpret key portions of the Act. We are enclosing a copy, which was developed through a coordinated process involving counsel's offices at DOT, the ICC, and the Federal Highway Administration.

Thank you for bringing these issues to our attention, and I hope that this information will be of assistance to you.

Sincerely,

____/s/_____

Stephen H. Kaplan

General Counsel

Enclosure

U.S. DEPARTMENT OF TRANSPORTATION

INTRASTATE TRUCKING DEREGULATION:
AN ANALYSIS AND INTERPRETATION OF TITLE VI, FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT OF 1994, P.L. 103-305

Summary of Title VI: Title VI preempts most State and local regulation of the prices, routes, and services of intrastate motor carriers of property. It became effective January 1, 1995, except in Hawaii.

Statutory Exemptions: The statute expressly exempts regulation regarding the transportation of household goods. It also expressly exempts regulation by States respecting (1) motor vehicle safety; (2) route controls or limitations based on vehicle sizes and weights or hazardous cargo; and (3) insurance requirements. Certain other provisions relating to uniform cargo liability, bills of lading, or cargo credit rules, or antitrust immunity for joint line rates or routes, classifications and mileage guides, may be imposed upon carriers so long as they consent and the provision covers the same subject matter as, and is no more burdensome than, certain statutory provisions or ICC or DOT regulations.

Constitutionality: Constitutional challenges to Title VI, based on Tenth Amendment and Commerce Clause claims, were rejected by United States District Courts in both Oklahoma and West Virginia. An appeal of the Oklahoma decision is pending in the United States Court of Appeals for the Tenth Circuit, and the merits of another complaint have yet to be heard in a United States District Court in Illinois.

Enforcement: The Department of Transportation and the Attorney General are authorized to enforce the preemption provisions of subsection 601(b) of Title VI, relating to transportation by air carrier or carrier affiliated with a direct air carrier, by virtue of the FAAA Act's placement of that subsection in the air commerce and safety part of Title 49,

United States Code. Subsection 601(c), which deals with other motor carriers, amends a provision of the Interstate Commerce Act, over which DOT does not exercise enforcement authority. As a practical matter, we anticipate that resolution of conflicts will occur at a the local level, with judicial relief being provided where necessary through requests for judicial relief being provided where necessary through requests for declaratory judgments, suits for injunctive relief, defenses to State and local enforcement actions, etc.

Contract Services: Title VI does not restrict States and localities from contracting with motor carriers to provide services to them, much as they might contract for any other services. See, e.g., American Airlines v. Wolens, No. 93-1286 (Jan. 18, 1995), in which the United States Supreme Court held that the preemption language of the Airline Deregulation Act (upon which Title VI was largely based) allows room for court enforcement of "frequent flyer" contract terms set by the parties themselves. State or local towing contracts may of course contain specifics on services, routing, and prices. However, if such contracts have the practical effect of restricting entry into the marketplace or limiting operations, based on demonstrations of public convenience and necessity or other considerations not grounded in legitimate safety or insurance regulation, they will likely run afoul of the new law. Where contested matters arise in this area, we expect that scrutiny will be given to whether the State or locality has acted as a customer in such arrangements, or effectively as a regulator.

Garbage and Curbside Household Recyclables: Title VI governs motor carriers of *property*. The ICC has never regulated collection of garbage and curbside household recyclables, holding that they are not considered property. We thus do not regard Title VI as applying to pickups of trash and recyclables at the curbside. (However, the transportation of recyclables in commercially valuable quantities, such as a

movement of metal scrap to or from a foundry, is likely subject to Title VI.)

Tow Truck Operations Tow truck operators are considered to be motor carriers of property under the Interstate Commerce Act and are, under some circumstances, subject to ICC jurisdiction. See 49 USC 10526(b)(3). States and localities, as noted above, may freely contract as customers for services to be supplied by particular tow truck operators, but scrutiny would be given to contracts that appear to be a guise for economic regulation. We also note that State actions that are legitimately grounded in public safety considerations are exempt from Title VI. For example, we believe that State or local regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption, assuming again that such regulations are not a guise for broader economic restrictions. [We note in this regard that bills have been introduced in the Congress, S. 302 and H.R. 866, which would specifically exempt State regulations relating to the towing of a motor vehicle performed at the request of a law enforcement officer or without the prior consent or authorization of the owner or operator of the vehicle. The Department has no position on these bills at this time.]

March, 1995

Supreme Court U.S.
FILED
MAR 21 2002
OFFICE OF THE CLERK

No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN, and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Does 49 U.S.C. § 14501(c), which explicitly preempts both "a State" and "a political subdivision of a State" from enacting or enforcing any law "related to a price, route, or service of any motor carrier," but exempts only the "authority of a State" to regulate the safety of motor vehicles, thereby preempt municipal regulation and licensing of tow-truck operations – other than laws governing the price of nonconsensual tows, which are expressly exempted from preemption under subsection (c)(2)(C)?

LIST OF PARTIES

The only parties to this proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.6, the Court is advised that respondents have no parent companies and that no publicly held company owns 10% or more of stock in either respondent.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 2

I. Evolution of the American Motor Carrier Industry ... 2

II. Deregulation of Interstate and Intrastate Trucking 4

III. Developments in the Marketplace for Towing and Recovery Services 5

IV. The Background to These Proceedings 6

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS IS EXPRESSLY PREEMPTED UNDER 49 U.S.C. § 14501(c) 9

A. The Statute Expressly Preempts Any "Political Subdivision" from Applying Its Own Laws Related to Prices, Routes, or Services of Motor Carriers; the Saving Provisions for "Authority of a State" Do Not Dictate Otherwise 10

TABLE OF AUTHORITIES
(continued)

PAGE

1. The Plain Meaning of the Preemption Clause 10

2. The Plain Meaning of the Preemption Clause Combined with the Saving Clauses . 14

3. The Effect of the Saving Provisions 16

B. Traditional Canons of Statutory Construction Strongly Support Preemption Here 22

1. The Avoidance of Surplusage 23

2. Language Expressly and Repeatedly Used in One Statutory Section But Purposely Omitted Elsewhere in the Same Section ... 26

3. Exceptions to Preemption Set Forth in Saving Clauses Cannot Swallow Up the Express Preemption Congress Provided 29

C. The Purpose of the Motor Carrier Laws, to Deregulate Interstate and Intrastate Trucking Markets, Strongly Supports Preemption Here ... 30

D. Responses to Petitioners' Miscellaneous Points About the Meaning of the Statutory Text ... 35

1. The Meaning of "Enact or Enforce" 35

2. The "Authority of 2 or More States" 36

TABLE OF AUTHORITIES
(continued)

PAGE

3. Route Controls Based on Size, Weight, and Hazardous Cargo 38

4. Saving Clauses Enacted at Different Times . 39

II. THERE IS NO CONSTITUTIONAL OR OTHER BASIS FOR THE COURT TO STRAIN TO READ AROUND THE EXPRESS PREEMPTION THAT CONGRESS HAS PROVIDED 40

A. This Deregulatory Statute, Which Confers No Role for Any Agency to Decide Preemption, Affords No Basis to Grant Deference to DOT Based on Other Regulatory Statutes 41

B. The Tenth Amendment Does Not Require the Court to Depart from the Plain Language of the Express Preemption Clause 47

CONCLUSION 50

TABLE OF AUTHORITIES

PAGE

Cases

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 41
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 17
American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 11, 12, 36, 48
Arcadia v. Ohio Power Co., 498 U.S. 73 (1990) 24
Arkansas Best Corp. v. Commissioner,
485 U.S. 212 (1988) 39
Barnhart v. Sigmon Coal Co., 122 S. Ct. 941 (2002) 27
Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998) 27
BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 27
Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 13
Brown v. Gardner, 513 U.S. 115 (1994) 27
Buck v. Kuykendall, 267 U.S. 307 (1925) 2
California Div. of Labor Standards Enforcement v.
Dillingham Constr., 519 U.S. 316 (1997) 13
Californians for Safe & Competitive Dump Truck
Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) .. 12
Cardinal Towing & Auto Repair, Inc. v. City of Bedford,
180 F.3d 686 (5th Cir. 1999) 6
Chevron U.S.A., Inc. v. Natural Resources Defense
Ccl., Inc., 467 U.S. 837 (1984) 40, 41
Christensen v. Harris County, 529 U.S. 576 (2000) 41
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) .. 32
City of Chicago v. Atchison, T. & S.F. Ry. Co.,
357 U.S. 77 (1958) 3
City of Chicago v. Environmental Defense Fund,
511 U.S. 328 (1994) 27
City of Lafayette v. Louisiana Power & Light Co.,
435 U.S. 389 (1978) 33
Consolidated Rail Corp. v. Smith,
664 F. Supp. 1228 (N.D. Ind. 1987) 39

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 10, 14, 36
Department of Revenue of Or. v. ACF Indus., Inc.,
510 U.S. 332 (1994) 25
Donelon v. New Orleans Terminal Co., 474 F.2d 1108
(5th Cir.), *cert. denied*, 414 U.S. 855 (1973) 39
Duncan v. Walker, 121 S. Ct. 2120 (2001) 25, 26, 27
Duparquet Co. v. Evans, 297 U.S. 216 (1936) 40
Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 10, 46
FEC v. NRA Political Victory Fund,
513 U.S. 88 (1994) 27
Federal Express Corp. v. California Pub. Util. Comm'n,
936 F.2d 1075 (9th Cir. 1991), *cert. denied*,
504 U.S. 979 (1992) 31
Federal Maritime Comm'n v. Seatrain Lines, Inc.,
411 U.S. 726 (1973) 42
Finley v. United States, 490 U.S. 545 (1989) 22, 29
FMC Corp. v. Holliday, 498 U.S. 52 (1990) 10
FTC v. Sun Oil Co., 371 U.S. 505 (1963) 27
Geier v. American Honda Motor Co.,
529 U.S. 861 (2000) 14, 36, 42, 47
General Motors Corp. v. United States,
496 U.S. 530 (1990) 27
Giddens v. City of Shreveport,
901 F. Supp. 1170 (W.D. La. 1995) 5
Grand Truck W.R.R. v. City of Fenton,
482 N.W.2d 706 (Mich. 1992) 38
Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 19
Hohn v. United States, 524 U.S. 236 (1998) 27
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 27
International Org. of Masters, Mates & Pilots v. Brown,
498 U.S. 466 (1991) 27

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 29
Iselin v. United States, 270 U.S. 245 (1926) 16
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 9
Keene Corp. v. United States, 508 U.S. 200 (1993) 27
King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 15, 39
Lorillard Tobacco Co. v. Reilly,
121 S. Ct. 2404 (2001) 9, 22
Mackey v. Lanier Collection Agency & Serv., Inc.,
486 U.S. 825 (1988) 43
McNary v. Haitian Refugee Ctr., Inc.,
498 U.S. 479 (1991) 22
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 36, 42, 48
Metropolitan Washington Airports Auth. v.
Citizens for the Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 37
Mt. Healthy City Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 17
Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) ..... *passim*
National Credit Union Admin. v. First Nat'l Bank
& Trust Co., 522 U.S. 479 (1998) 19
New York v. United States, 505 U.S. 144 (1992) 48
Norfolk & W. Ry. Co. v. Train Dispatchers,
499 U.S. 117 (1991) 33
Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) 43
Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,
484 U.S. 97 (1987) 27
Pennsylvania Dept. of Pub. Welfare v. Davenport,
495 U.S. 552 (1990) 25

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Petrey v. City of Toledo,
246 F.3d 548 (6th Cir. 2001) 6, 7, 21
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 11
Port Authority Trans-Hudson Corp. v. Feeney,
495 U.S. 299 (1990) 37
Printz v. United States, 521 U.S. 898 (1997) 48, 49
R. Mayer of Atlanta, Inc. v. City of Atlanta,
158 F.3d 538 (11th Cir. 1998),
cert. denied, 526 U.S. 1038 (1999) 21, 30, 33, 45
Railroad Transfer Serv. Inc. v. City of Chicago,
386 U.S. 351 (1967) 3
Rowland v. California Men's Colony,
506 U.S. 194 (1993) 22
Russello v. United States, 464 U.S. 16 (1983) 26
St. Paul Fire Marine Ins. Co. v. Barry,
438 U.S. 531 (1978) 40
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 11, 12
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 42
Sloan v. SEC, 436 U.S. 103 (1978) 43
Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996) 42
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir.),
reh'g denied, 266 F.3d 342 (2001), *cert. pending*,
U.S. No. 01-1028 ..... 21, 29
Texas & P. Ry. Co. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 29, 30
Tocher v. City of Santa Ana, 219 F.3d 1040 (9th
Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001) 6, 21
Traynor v. Turnage, 485 U.S. 535 (1988) 46
United States v. Lexington Mill & Elevator Co.,
232 U.S. 399 (1914) 23
United States v. Locke, 529 U.S. 89 (2000) 10

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

United States v. Lopez, 514 U.S. 549 (1995) 49
United States v. Mead Corp., 533 U.S. 218 (2001) ... 41, 42
United States v. Naftalin, 441 U.S. 768 (1979) 26
United States v. Nordic Village, Inc.,
503 U.S. 30 (1992) 23
United States Trust Co. v. New Jersey,
431 U.S. 1 (1977) 37
Washington Market Co. v. Hoffman,
101 U.S. 112 (1879) 23
Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.,
505 U.S. 214 (1992) 19
Wisconsin Public Intervenor v. Mortier,
501 U.S. 597 (1991) ..... *passim*

Constitution, Statutes and Rules

U.S. CONST. art. I, § 8, cl. 3 ..... 47, 49
U.S. CONST. art. VI, cl. 2 ..... *passim*
U.S. CONST. amend. X ..... *passim*
U.S. CONST. amend. XI 17
U.S. CONST. amend. XIV 17
7 U.S.C. § 136v(a) 20, 21
15 U.S.C. § 3202(8) 20
16 U.S.C. § 796(21)&(15) 20
28 U.S.C. § 2244(d)(2) 25
30 U.S.C. § 1291(26) 19
42 U.S.C. § 6929 20
42 U.S.C. § 8302(21) 20
49 U.S.C. § 1305(a)(1) (1988) 37
49 U.S.C. § 5112(b)(1)(H)(i) 46
49 U.S.C. § 5125(d)(1) 46
49 U.S.C. § 11501(h)(1) (1994) 4

TABLE OF AUTHORITIES
(continued)

PAGE

Constitution, Statutes, and Rules

49 U.S.C. § 13101 31
49 U.S.C. § 13102(12) 13
49 U.S.C. § 13102(18) 17
49 U.S.C. § 14501(a) 28
49 U.S.C. § 14501(b) 28
49 U.S.C. § 14501(c) ..... *passim*
49 U.S.C. § 14504 46
49 U.S.C. § 20106 39
49 U.S.C. § 30102(a)(8) 45
49 U.S.C. §§ 31101 *et seq.* 44
49 U.S.C. §§ 31131-47 44
49 U.S.C. § 31132(7)-(9) 17
49 U.S.C. § 31141 45
49 U.S.C. § 41713(b)(4) 11, 14, 28
Airline Deregulation Act of 1978, Pub. L.
No. 95-504, 92 Stat. 1705 ..... 4, 10, 36, 37
Employee Retirement Income Security Act
of 1974, 88 Stat. 829 ..... 11, 13, 46
Federal Aviation Administration Authorization Act,
Pub. L. No. 103-305, 108 Stat. 1569 (1994) ..... *passim*
Federal Insecticide, Fungicide, and Rodenticide Act,
61 Stat. 163 (1947) 20, 21
Federal Railroad Safety Act of 1970, 84 Stat. 971 14
Hazardous Materials Transportation Act, Pub. L.
No. 93-633, tit. I, 88 Stat. 2156 ..... 38, 43, 46
Interstate Commerce Commission Termination
Act of 1995, Pub. L. No. 104-88, § 103,
109 Stat. 803, 899 ..... 1, 5, 30, 32, 34
Motor Carrier Act of 1935, Pub. L. No. 255,
49 Stat. 543 3
Motor Carrier Act of 1980, Pub. L. No. 96-296,
94 Stat. 793 4

TABLE OF AUTHORITIES
(continued)

PAGE

Constitution, Statutes, and Rules

Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832 43
National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 14
Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993 4
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-04, 96 Stat. 2154-57 43
H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715 ..... 4, 32, 33
H.R. Rep. No. 104-311 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793 ..... 32, 34
141 Cong. Rec. H15,602 (1995) (statement of Rep. Rahall) 35
49 C.F.R. § 350.333(a) 44
49 C.F.R. § 355.25(a) 45
66 Fed Reg. 37,260 (2001) 45
66 Fed. Reg. 29,867 (2001) 45
Columbus City Code §§ 549.01-.99 6
City of Columbus Wrecker Rules and Regulations 6

Other Authorities

American Heritage Dictionary (4th ed. 2000) 18
Black's Law Dictionary (7th ed. 1999) 17
Brief for United States as Amicus Curiae, *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (U.S. No. 89-1905) 50
WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940 (1985) 3

TABLE OF AUTHORITIES
(continued)

PAGE

Other Authorities

ROBERT FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970) 4
Liberty Trucking Co., Extension – General Commodities, 130 M.C.C. 243 (1978) 4
Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971) 4
2A Norman J. Singer, *Sutherland on Statutory Construction* (6th ed. 2000) 23
William E. Thoms, *Rollin' on . . . to a Free Market: Motor Carrier Regulation 1935-1980*, 13 TRANSP. L.J. 43 (1983) 2
1 U.S. Bureau of the Census, *1997 Census of Governments, Government Organization* (1999) 33
Webster's Third New Int'l Dictionary (1993) 18

INTRODUCTION

Congress accomplished a sweeping deregulation of the motor carrier industry nationwide by enacting the Federal Aviation Administration Authorization Act ("FAAA Act"), Pub. L. No. 103-305, 108 Stat. 1569 (1994), followed almost immediately by the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899 ("ICCTA"). In those statutes, it clearly stated that the authority of States *and* political subdivisions to apply their laws related to the "price, route or service of any motor carrier" (including tow trucks) is expressly preempted. *See* 49 U.S.C. § 14501(c). Congress then provided specific exemptions from preemption for *both* States *and* political subdivisions (including one addressing the price of nonconsensual towing operations), none of which applies here. Congress also provided one other set of exemptions from preemption, which it extended to the authority "of a State" but *not* to the authority of a political subdivision. In context of this particular statutory regime, the court below correctly held that the statute expressly preempts municipal licensing laws that apply to the consensual towing operations at issue in this case.

As discussed below, the text and structure of the statute, along with the cardinal principles of statutory construction that establish the baseline for crafting federal legislation, all strongly support preemption here. Preemption also accords with the core purpose of the statute itself, which completed congressional deregulation of the trucking industry in order to reduce prices and promote efficiency for consumers. This purpose was achieved by abolishing the venerable ICC and by clearing away a costly patchwork of restrictions and regulations that had accumulated in both the interstate and intrastate trucking markets. Congress thus carefully limited the extent of permissible regulation at the state and local level, in order to liberate the trucking industry as much as possible from an

inconsistent and inefficient tangle of impediments that would frustrate these deregulatory goals.

Congress' considered decision to adopt this approach is clearly set forth in the plain language of the statute, and its express provisions on preemption are not subject to regulatory deference. Moreover, this construction of the statute poses no constitutional problems under the Tenth Amendment and must be given effect under the Supremacy Clause. In sum, the decision below on the express preemption issue, which is consistent with the great weight of lower court authority, is correct and should be affirmed.

COUNTERSTATEMENT OF THE CASE

I. Evolution of the American Motor Carrier Industry.

Within the transportation sector, "[o]ver-the-road trucking is a relatively new industry, with a pedigree about as old as the airlines.. The condition of roads prior to the First World War made long-distance hauling impractical, and a heavy duty chassis suitable for hauling goods did not appear until the middle 1920's." William E. Thoms, *Rollin' on . . . to a Free Market: Motor Carrier Regulation 1935-1980*, 13 TRANSP. L.J. 43, 44-45 (1983). Trucking grew up as an adjunct to other modes of transportation, particularly the railroads, which held a virtual freight monopoly. The gradual development of an all-weather system of roads, however, made trucking a superior mode of carriage for "high-valued shipments," and increasingly with respect to other inter-city freight, since the truck "could go from door to door without any incidental switching." *Id.* at 45-47.

In these early years, motor carriers were regulated, if at all, at the state level. Yet the expansion of this mode of transport created new issues, including a ruling by this Court that no State could forbid or limit a motor carrier from engaging in interstate commerce. *See Buck v. Kuykendall*, 267 U.S. 307 (1925). From many quarters, not least the railroads, there was a growing call for federal regulation of motor carriers; at the same time, ease of entry and the resulting cut-throat competition made

many truckers themselves desirous of an orderly system of regulation to limit entry and provide control over specific routes. Congress responded by enacting the Motor Carrier Act of 1935, Pub. L. No. 255, 49 Stat. 543, which authorized the ICC to establish a new regime of federal regulation. "Utility-type regulation was thus adopted for an industry which had few characteristics of a natural monopoly." Thoms, *supra*, at 50. *See generally* WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940 (1985). The Court later elaborated on its *Buck* decision by ruling that no municipality could impose a comprehensive licensing scheme that would limit a motor carrier from engaging in interstate commerce by denying a license for noncompliance with its provisions. *See, e.g., City of Chicago v. Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77 (1958); *Railroad Transfer Serv. Inc. v. City of Chicago*, 386 U.S. 351 (1967).

Under federal regulation, motor carriage blossomed as a mode of transport, aided by continuing improvements in roads and vehicles. Over time, the industry began to provide an array of distinct services, including common carriage of general commodities, agricultural transport, private carriage, package delivery, truck rentals, moving vans, bus service, and specialized carriage. Criticism of the regulatory model mounted, however, amidst charges that restricted entry and agency capture were blocking the benefits of competition in what could easily be a competitive industry. The intrastate trucking market also remained subject to regulation at the state level. Artificially high rates were determined to disserve the public and foster inflationary pressures by acting as a tax on all producers who used trucking services – an ever larger segment of the American economy. *See* ROBERT FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971). Over the next decade, the ICC began to liberalize entry and favor promotion of competition, and some States followed its lead. *See, e.g., Liberty Trucking Co., Extension – General Commodities*, 130

M.C.C. 243 (1978). In 1980, Congress embraced this shift by enacting partial deregulation that revamped the ICC's control of interstate trucking to promote competitive and efficient transportation services. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

II. Deregulation of Interstate and Intrastate Trucking.

Over the ensuing decade, it was recognized that the policy choice to deregulate trucking markets and promote unfettered competition not only would require further measures at the federal level, but would require dislodging existing state and local regulation as well. An important model was the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, which had scaled back regulations in the air carrier industry. Its broad provisions for preemption of state and local laws was initially extended to freight forwarders in the Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993. There was also growing support for extending the same provisions to the rest of the motor carrier industry.

After a legislative struggle, this was achieved in two steps. First, Congress passed the FAAA Act, which deregulated intrastate regulation of motor carriers. In it, Congress enacted an express preemption clause for motor carriers (and amended the preemption clause for air carriers to make them identical), which nullified any state or local law or regulation "related to a price, route, or service of any motor carrier" of property. 49 U.S.C. § 11501(h)(1) (1994). Contrary to frequent assertions made about it, this statute went well beyond preempting only "economic" measures enacted by state and local governments. Instead, it was directed at uprooting the great mass of laws and regulations found at the state and local level that imposed costly burdens on intrastate trucking. It accomplished this objective for the entire spectrum of interstate and intrastate motor carriers, in order to level the playing field within the trucking industry and promote vigorous new forms of competition. *See* H.R. Conf. Rep. No. 103-677, at 83-87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755-59.

A year later, Congress took a second and related step by abolishing the ICC (the oldest independent federal regulatory agency and the most enduring agency ever to be eliminated) and unfettering competition in the interstate trucking market. *See* ICCTA, *supra*. This statute recodified the express preemption clause from the FAAA Act with minor revisions, except that Congress added an exemption explicitly restoring state *and* local authority to regulate the price of nonconsensual towing operations. *See* 49 U.S.C. § 14501(c)(2)(C).

III. Developments in the Marketplace for Towing and Recovery Services.

The development of towing and recovery services parallels in certain respects the growth of the motor carrier industry as a whole. From its origins as a quintessentially local service, the motor carriage of vehicles has expanded into interstate commerce with the advent of long-haul towing. While many towing companies continue to operate in a specific geographic area, other towing companies have merged operations to secure new efficiencies and economies of scale, and some now do business in multiple States. *See* Brief of Amicus Curiae Towing & Recovery Ass'n of Am. in Support of Respondents 1-6. Although some had questioned whether Congress intended the motor carrier deregulatory statutes to apply to tow trucks at all, *see, e.g.*, *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1183 (W.D. La. 1995), Congress put this issue to rest by enacting a limited exemption from the preemption clause in 49 U.S.C. § 14501(c)(1), which specifically applied only to the *price* of *nonconsensual* towing operations, *see id.* § (c)(2)(C).

The towing work performed by respondents and other tow-truck operators falls into two distinct categories. "Consensual" tows are performed at the request of the vehicle owners, who select the towing operators they wish to use. These services are purely contractual in nature, and include towing, storage, security, and repair of the vehicle. "Nonconsensual" tows are performed without the consent of the vehicle owners, which may include the towing of unauthorized vehicles from private

property, stolen or abandoned vehicles, or the towing of vehicles disabled in an accident when the vehicle operator is unable or unwilling to select a towing service. In nonconsensual towing situations, many municipalities have assumed direct control over the towing of all vehicles disabled in accidents, and their authority to do so has been consistently upheld by the lower courts under the "municipal proprietor" exception to preemption. *See, e.g., Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 694-96 (5th Cir. 1999); *Petrey v. City of Toledo*, 246 F.3d 548, 555-59 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048-50 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001). Respondents have urged that this authority – along with each State's undisputed authority to regulate the safety of motor vehicles under 49 U.S.C. § 14501(c)(2)(A) – affords ample means to address the safety issues raised by petitioners.[1]

IV. The Background to These Proceedings.

Respondent Ours Garage and Wrecker Service, Inc. operates a towing business in Ohio. Respondent Towing and Recovery Association of Ohio, a trade organization, comprises members who do business in the towing and recovery industry in Ohio and elsewhere. *See* Pet. App. 1a-2a.

The City of Columbus has adopted ordinances that govern any towing operation that picks up vehicles within its municipal limits. *See* Columbus City Code §§ 549.01-.99 (reprinted at Pet. App. 36a-47a). The Columbus Director of Public Safety has issued rules and regulations governing towing operations. *See* City of Columbus Wrecker Rules and Regulations (reprinted at Pet. App. 47a-53a). In general, these regulations constitute a licensing scheme for all tow trucks, including recordkeeping, inspections, identification, and insurance requirements. *See id.*

[1] For a detailed account of the rise and decline of federal, state, and local regulation in the motor carrier industry, and its long march toward unfettered competition, see Brief of the American Trucking Ass'ns, Inc. et al. as Amici Curiae in Support of Respondents, Section A.

These regulations also impose, as a condition for obtaining a municipal license, a requirement that each towing operator must pay specified fees for each vehicle ($75 annually per vehicle) and each driver ($25 per driver in the first year and then $15 annually per driver). *See id.* at 38a.

Respondents filed this declaratory judgment action in federal court, contending that Columbus' towing regulations are expressly preempted as applied only to *consensual* towing operations. *See* J.A. 8-9. The facts were not disputed and both parties moved for summary judgment. *See id.* at 15-19. The District Court granted summary judgment for respondents, holding that the regulations were preempted. Pet. App. 34a.

While petitioners' appeal was pending, the Sixth Circuit issued its decision in *Petrey*, which the City conceded was controlling here. *See* Pet. App. 2a. The Court of Appeals noted that respondents had brought this case to enjoin enforcement of Chapter 549 of the Columbus City Code, "which regulates consensual towing operations." *Id.* It also noted that in *Petrey*, "we held that the ICA does not preempt municipal licensing and safety regulation of non-consensual towing operations when a municipality acts as a market participant, but does preempt other regulation not falling within this narrow exception." *Id.* Based on *Petrey*, therefore, the Court of Appeals simply affirmed the judgment of the District Court in a brief opinion. *See id.*

SUMMARY OF ARGUMENT

Congress has clearly stated that the authority of States *and* political subdivisions to apply laws or regulations related to the prices, routes, and services of motor carriers is expressly preempted. *See* 49 U.S.C. § 14501(c)(1). Congress then provided several specific exemptions from preemption for *both* States *and* political subdivisions, *see id.* § (c)(3), including one exception that addresses the price of nonconsensual towing operations, *see id.* § (c)(2)(C). None of those exceptions is applicable here, except to confirm that tow trucks are classified as "motor carriers" within the ambit of the statute. *See id.*

Congress also provided one other set of exemptions from preemption, which it extended to the authority "of a State" but did *not* extend to the authority of a political subdivision. *See id.* § (c)(2)(A). The plain text of the statute thus expressly preempts municipal laws related to the "price, route, or service" of the consensual towing operations at issue in this case.

The statutory text, its structure, and accepted canons of statutory construction all strongly support preemption here. Petitioners' reading would accord no meaning at all to one of the key statutory phrases – "political subdivision" – and would essentially read it out of a statute where it appears frequently. In addition, it is well settled that where Congress used specific language repeatedly in a statutory section and then purposely omitted the same language from one of its subsections, that distinction is understood to be deliberate and must be given its natural effect of conveying a different meaning. Finally, the Court has often stated that a saving clause cannot be construed in a manner that defeats the objective served by the principal preemption clause, as would be the case here if the "safety" exception were read broadly to authorize every municipality and local unit of government to impose their own licensing schemes and related fees upon any and all types of motor carriers.

Preemption also accords with the core purpose of the statutes that deregulated the motor carrier industry, which mirrored the preemption provisions of the prior law deregulating air carriers. In the course of deregulating the trucking industry nationwide – including both its interstate and intrastate markets – Congress sought to promote free competition among motor carriers in order to provide greater efficiency and lower prices for consumers. With this objective in mind, Congress abolished the ICC, substantially reduced the amount of federal regulation, and carefully limited the extent of permissible regulation at the state and local level. These steps were all designed to liberate the trucking industry as much as possible from an inconsistent and inefficient tangle of restrictions that would impede the central goal of deregulation. Construing the statute to preempt

municipal and other local laws that would license and regulate the operations of motor carriers is the only result here that is consistent with its core purpose.

Congress' considered decision to adopt this sensible approach in the plain language of the statute must be given effect under the Supremacy Clause. Because the text is clear and provides no basis for regulatory adjudication of the metes and bounds of the express preemption clause, regulatory deference is not warranted. Finally, federal limitations on municipal authority in this realm do not infringe the Tenth Amendment and hence there is no justification to depart from the explicit language of the express preemption clause.

ARGUMENT

I. MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS IS EXPRESSLY PREEMPTED UNDER 49 U.S.C. § 14501(c).

This case presents a question of express preemption, based on Congress' action in specifically articulating the bounds of preemption in the text of the statute itself. It thus presents no issues about implied preemption or regulatory implementation of delegated discretion. Instead, it turns entirely on the proper interpretation of statutory language.

In express preemption cases like this one, the "ultimate touchstone" in "identify[ing] the domain expressly preempted" is, and can only be, congressional purpose as embodied in the text of the legislation actually enacted by Congress. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2414 (2001). In all such cases, the command of the Supremacy Clause must be honored, and preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even in "areas of traditional state regulation such as family law," the background presumption against preemption is "overcome where, as here, Congress has made clear its desire for preemption" by enacting

an express preemption clause. *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001). This is particularly true in an area where the federal government has had extensive involvement, *see United States v. Locke*, 529 U.S. 89, 107-08 (2000), such as motor carriage transportation affecting interstate commerce.

This inquiry therefore begins, and typically ends, "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (quotation omitted). As shown below, in 49 U.S.C. § 14501, Congress affirmatively extended its deregulation of the interstate trucking market to the intrastate trucking market as well. To achieve this objective, Congress expressly preempted virtually all municipal regulation of motor carriers of property, including the licensing scheme at issue in this case.

A. The Statute Expressly Preempts Any "Political Subdivision" from Applying Its Own Laws Related to Prices, Routes, or Services of Motor Carriers; the Saving Provisions for "Authority of a State" Do Not Dictate Otherwise.

1. *The Plain Meaning of the Preemption Clause.*

In an express preemption case like this one, the statutory analysis must begin with the text of the preemption clause itself. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."). Here the preemption clause states as follows:

> **(c) Motor carriers of property.—**
>
> **(1) General rule.**—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

The sense conveyed by this preemption clause is familiar, as the Court has twice construed virtually identical language in the preemption clause of the Airline Deregulation Act of 1978, now codified at 49 U.S.C. § 41713(b)(4). *See American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In addressing this provision, the Court has made two points highly relevant here: *first*, that it is broad; *second*, that it is not all-encompassing.

Regarding the breadth of the preemption that Congress provided in these terms, the Court has held that it incorporates the ordinary meaning of the phrase "relate to" as construed in ERISA, where the preemption provision has been understood to be "'deliberately expansive.'" *Morales*, 504 U.S. at 383-84 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987)). Accordingly, the statute is construed to preempt actions that have "'a connection with or reference to'" the price, route, or service of any motor carrier. *Morales*, 504 U.S. at 385 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). *See also Wolens*, 513 U.S. at 222-23 (same).

Thus, in *Morales*, the Court held that federal law preempted state efforts to prohibit allegedly deceptive airline fare advertisements by enforcing published guidelines through their general consumer protection statutes – actions which had both a connection with and a reference to airline fares, and indeed would have had "a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." 504 U.S. at 390. Similarly, in *Wolens*, the Court applied the same tests to hold that federal law

preempted application of the Illinois Consumer Fraud Act to police the marketing practices of the airlines, 513 U.S. at 228, though it denied preemption with respect to "routine breach-of-contract claims" adjudicated in the state courts, *id.* at 232.

At the same time, however, the Court recognized that the great breadth of the scope of preemption must be cabined within certain common-sense limits. In *Morales*, in response to an argument that this broad reading of the preemption clause would sweep within its orbit "state laws against gambling and prostitution as applied to airlines," the Court demurred, noting that "'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." 504 U.S. at 390 (quoting *Shaw*, 463 U.S. at 100 n.21) (brackets in original). And in *Wolens*, the Court reaffirmed that "state actions 'too tenuous, remote, or peripheral'" in nature were not implicated at all by the preemption clause. *Wolens*, 513 U.S. at 224 (quoting *Morales*, 504 U.S. at 390).

There is thus an important limitation on the scope of the preemption clause in 49 U.S.C. § 14501(c)(1). This provision, though written broadly, does not create a "law-free zone" surrounding all motor carriers. For example, general corporate tax laws that apply to all other businesses indisputably apply in the same fashion to motor carriers, even though such laws inevitably bear upon the prices charged for trucking services. The same goes for sales taxes, workers' compensation laws, minimum wage laws, pension laws, and all other general provisions that play at least some part in dictating the prices charged by motor carriers. *See, e.g., Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) (prevailing wage laws not preempted). In the Court's own terms construing the applicable statutory language, these matters either lack the requisite "connection with or reference to" motor carrier prices, *Morales*, 504 U.S. at 385 (quotation omitted), or they are "state actions too tenuous, remote, or peripheral" in nature to be implicated by the preemption clause. *Wolens*, 513 U.S. at 224 (quotation

omitted). In the same vein, general provisions that also have some bearing upon the services provided by motor carriers (and hence also on price), such as contract laws, employment laws, traffic laws, labor laws, and tort laws governing compensation for injuries to persons or property, are simply not implicated by the preemption clause. *Cf. California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 323-34 (1997) (ERISA does not preempt state prevailing wage law, which does not "relate to" employee benefit plans); *Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-68 (1995) (ERISA does not preempt state provisions for hospital surcharges, which do not "relate to" employee benefit plans).

Application of these principles under the preemption clause in 49 U.S.C. § 14501(c)(1) is straightforward in this case. The municipal licensing program challenged by respondents (with respect to consensual towing operations) applies on its own terms to all towing operators. The program includes special requirements for recordkeeping, inspections, identification, and insurance, while imposing specified annual fees for each vehicle and each driver as a condition for obtaining a municipal towing license. *See* Pet. App. 47a-53a. This licensing program thus has *both* "a connection with" *and* a "reference to" the prices and services of towing operators, because it directly affects their costs and manner of doing business, and it specifically applies only to them. *Morales*, 504 U.S. at 385. Furthermore, there is no question that a tow truck is a "motor carrier of property." The statute defines a "motor carrier" as "a person providing motor vehicle transportation for compensation," which encompasses tow trucks as well as all other kinds of trucks that provide for-hire services. 49 U.S.C. § 13102(12). Moreover, towing operators are in the regular business of transporting other vehicles, which makes them motor carriers "of property" within the meaning of section 14501(c)(1). Indeed, if any doubts remained on this score, the specific reference to *nonconsensual towing operations* in the saving provision set forth in section (c)(2)(C) leaves no room to doubt Congress'

recognition and understanding that other towing operations are encompassed within the terms of the preemption clause.

Indisputably, therefore, the licensing scheme challenged in this case, which was imposed by a "political subdivision" as specifically identified in subsection (c)(1), falls within the express terms of the preemption clause. It is also notable that none of this statutory analysis is unique to towing operators: any similar municipal licensing scheme that applied to other motor carriers of property, such as FedEx, UPS, and the like, would be preempted to the exact same extent and under the very same analysis of the plain text of the preemption clause.[2]

2. *The Plain Meaning of the Preemption Clause Combined with the Saving Clauses.*

In this particular statute, the express preemption clause is not presented in a vacuum, and does not constitute the entirety of the statutory subsection in which it appears. Instead, it is followed by distinct categories of saving clauses with several additional subcategories, all of which, taken in combination, further elucidate the scope of the principal clause and its effect on preemption. *See* 49 U.S.C. § 14501(c)(2)-(4). Each of these saving clauses is designed to carve out specific realms in order to "save" them from preemption. Although they all use slightly different verb forms to accomplish this purpose – "shall not apply," § (c)(4); "shall not affect," § (c)(3); "does not apply," § (c)(2)(B)&(C); "shall not restrict," § (c)(2)(A) – the effect is the same, to create saving provisions similar to those found in many other preemption statutes. *See, e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act of 1966); *Easterwood*, 507 U.S. 658 (Federal Railroad Safety Act of 1970).

---

[2] One distinction without a difference is that FedEx has been determined to be an "air carrier" covered by the preemption clause contained in 49 U.S.C. § 41713(b)(4), which is identical in every relevant respect to the language of 49 U.S.C. § 14501(c)(1).

The sole saving provision cited by petitioners and their *amici* to avoid preemption in this case is the first clause of section (c)(2)(A), which refers to "the safety regulatory authority of a State with respect to motor vehicles." *Id.* We will return in the next section to consider in more detail what precise realm Congress thereby intended to "save" from preemption, and why we think the text cannot bear the weight of petitioners' arguments. For the moment, however, it is important to see how the principal preemption clause fits together with the subordinate saving clauses, because when the statute is taken as a whole, the plain meaning of the language of section 14501(c) is evident. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (following "cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context").

The principal saving clauses are found in subsections (c)(2) and (c)(3), and they provide as follows:

> subsection (c)(2)(A) saves the "authority of a State" with respect to the safety of motor vehicles; highway route controls based on size, weight, or hazardous cargo of motor vehicles; and insurance for motor carriers;
>
> subsection (c)(2)(C) saves the "authority of a State or a political subdivision of a State" with respect to the price of nonconsensual for-hire motor vehicle transportation by a tow truck; and
>
> subsection (c)(3) saves the "authority of a State, political subdivision of a State, or political authority of 2 or more States" with respect to various aspects of intrastate transportation of property by motor carriers, such as uniform bills of lading and antitrust immunity.[3]

---

[3] Other minor saving provisions, not relevant here, exempt the transportation of household goods, *see* § (c)(2)(B), and motor carriers of property that operate within the State of Hawaii, *see* § (c)(4).

In essence, therefore, Congress has provided in this statute as follows: ***A, B, and C*** are preempted from acting in a particular realm; *except that* ***A*** has authority to take certain actions within that realm; *and except that* ***A and B*** have authority to take certain other actions within that realm; *and except that* ***A, B, and C*** have authority to take various other actions within that realm.

The question posed by the statutory posture in this case is whether ***B*** can claim the authority to take those actions listed in the first exception, where the plain language of the statute has named ***A and B*** in the preemption clause and then saved the authority to so act solely for ***A***. We submit that the *only* natural and ordinary meaning of this language, read together, is that ***B***'s authority to act is explicitly extinguished in the preemption clause and is not restored in the saving clause. This is even more clearly the case, given that ***B***'s authority to act is expressly preserved in the other saving clauses. Under the plain meaning of the statute, it is thus apparent that ***B*** lacks the claimed authority. In context of this statute, therefore, a "political subdivision of a State" cannot claim that the express preemption of its authority, which is accomplished in subsection (c)(1), is overridden by the saving provisions in subsection (c)(2)(A), which specifically refer only to "a State." *See, e.g.*, *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court . . . . To supply omissions transcends the judicial function.").

3. *The Effect of the Saving Provisions.*

Rather than beginning with the language of the preemption clause in subsection (c)(1), petitioners instead offer a reading of the statute that focuses solely on the first clause of the initial saving provision, which exempts from preemption "the safety regulatory authority *of a State* with respect to motor vehicles." § (c)(2)(A) (emphasis added). By divorcing this phrase from its surrounding text and context, petitioners contend that the phrase

"state regulatory authority" must be read, by definition, to preserve *both* state *and* municipal authority. *See* Petr. Br. 16-20. The statute, however, makes a careful separation between the authority "of a State" to enact or enforce regulations and the authority of "a political subdivision of a State" to enact or enforce regulations. Petitioners' muscular construction ignores the text of these statutory provisions taken as a whole, including both the principal preemption clause and the saving clauses.[4]

As an initial matter, the phrase "safety regulatory authority of a State with respect to motor vehicles" is equivalent to "the authority of a State to regulate the safety of motor vehicles." That is how petitioners and their *amici* read the statute also, which means that they place primary weight on the general phrase "regulatory authority," which they consider to be the same as "authority to regulate." Petr. Br. 16. Petitioners then put forward a legal definition of the term "*regulation*," which refers to the "act or process of controlling by rule or restriction," including "subordinate legislation" and "delegated legislation." *Black's Law Dictionary* 1289 (7th ed. 1999). Petitioners make much of the fact that this one lexicon also mentions that a "regulation" may be "issued by an administrative agency or a local government." *Id.* But standard definitions make clear that the term "regulation" itself is source-neutral, and refers only to a "governmental order having the force of law,"

---

[4] In addition, it bears mention that the term "State" is defined in this statute to mean "the 50 States of the United States and the District of Columbia," 49 U.S.C. § 13102(18), though other provisions of Title 49 define "State" for other purposes to include political subdivisions. *See, e.g.*, 49 U.S.C. § 31132(7)-(9) (defining "State" to include "a political subdivision" in some sections of the Motor Carrier Safety Act of 1984, but not in other sections). The particular factual and legal context is similarly crucial under the Constitution itself: the term "State" is defined to include political subdivisions under the Fourteenth Amendment, *see, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970), but not under the Eleventh Amendment, *see, e.g.*, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

i.e., a "principle, rule, or law designed to control or govern conduct." *American Heritage Dictionary* 1471 (4th ed. 2000).[5] The use of this source-neutral term thus imparts no *content* that would answer the question of whether a "regulation" is being imposed by a particular branch or level of government. And it certainly cannot override Congress' specific designation of which levels of government have such authority.[6]

Citing some judicial opinions that have referred to state "regulatory authority" in other contexts as including municipal regulation, petitioners also suggest that Congress should be understood to have used this phrase to evoke an alleged "tradition of meaning," so that it must be read to encompass municipal authority as well. Petr. Br. 17-18. This alleged tradition, however, does not bear scrutiny. Instead, the cases and other statutes merely show that when Congress and the courts refer to state "regulatory authority" in some contexts, they explicitly encompass only state authority, whereas in other contexts they may use this phrase to encompass both state and municipal authority. The proper inquiry, therefore, is always a contextual determination. But Congress' decision to employ the phrase "regulatory authority" imports no recognized meaning that determines this question one way or the other.

Indeed, this statute itself demonstrates the fallacy of the argument. In the principal preemption clause, for example, Congress refers to the authority of "a State . . . [to] enact or

---

[5] *See Webster's Third New Int'l Dictionary* 1913 (1993) (defining "regulation" as "an authoritative rule or principle dealing with details of procedure," or as "a rule or order having the force of law issued by an executive authority of a government").

[6] In any event, other aspects of petitioners' arguments show that they place no real significance on the term "regulatory" in the phrase "regulatory authority," since they read all three clauses of subsection (c)(2)(A) in precisely the same way, even though the second clause refers only to the unelaborated "authority of a State" and says nothing about "regulation" or "regulatory" authority. *See* Petr. Br. 27-28.

enforce a . . . regulation." 49 U.S.C. § 14501(c)(1). It cannot seriously be maintained, however, that this authority is intended to include municipal regulation as well as state regulation, for Congress also referred separately *in the same passage* to the authority of a "political subdivision of a State . . . [to] enact or enforce a . . . regulation." If the "regulatory authority" of a State were to be read as petitioners suggest, then the latter clause in subsection (c)(1) is meaningless and nonsensical. The same problem would also arise with the identical uses of the term "regulation" in the saving clauses found in subsections (c)(2)(C) and (c)(3). It thus appears that Congress employed the term "regulation," as found throughout this statute, to refer only to those controlling rules and directives imposed pursuant to delegated legislative power *at the same level* of jurisdictional authority – *i.e.*, in some instances regulations imposed by "a State," in other instances regulations imposed by a "political subdivision of a State," and in yet other instances regulations imposed by a "political authority of 2 or more States." *Id.* § (c)(1).

Because the term "regulation" is used in other parts of 49 U.S.C. § 14501(c) to refer only to delegated legislative actions taken at the same level of government, it would be improper to read the phrase "regulatory authority" in any different fashion in subsection (c)(2)(A). Indeed, it is an "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (same); *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (same).

It is also pertinent that in various other statutes, Congress has expressly preserved "state regulatory authority" to the state governments alone, and not to municipal governments as well. *See, e.g.*, 30 U.S.C. § 1291(26) (surface mining control) (defining "State regulatory authority" as meaning "the department or agency in each State which has primary

responsibility *at the State level* for administering this chapter") (emphasis added); 42 U.S.C. § 8302(21) (powerplant and industrial fuel) (defining "State regulatory authority" as meaning "any State agency which has ratemaking authority with respect to the sale of electricity by any State regulated electric utility"); 15 U.S.C. § 3202(8) (defining "State regulatory authority" as meaning "any State agency which has ratemaking authority with respect to the sale of natural gas by any gas utility (other than by such State agency)"); 42 U.S.C. § 6929 (distinguishing between a "State or political subdivision" and a "State" for purposes of regulating hazardous waste).[7] These provisions underscore the need for close analysis of congressional intent as embodied in different statutes with distinct purposes.[8]

Petitioners also rely heavily on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). Their reliance is misplaced, however, because the statutory framework and hence the preemption issues were very different in that case. In *Mortier*, the Court held that under the Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163 (1947) ("FIFRA"), the States were permitted to redelegate authority to political subdivisions to regulate pesticides, even without explicit statutory language so providing, where FIFRA simply says, without elaboration, that a "State" may regulate pesticides. *See* 7 U.S.C. § 136v(a). The Court accepted this unexceptionable proposition in the

---

[7] By contrast, in some contexts Congress has chosen to define "state regulatory authority" to encompass "the regulatory body of the State or municipality," 16 U.S.C. § 796(21)&(15) (hydroelectric power), which reinforces that the statutory inquiry must be contextual, and the determination must be made with specific reference to the language and purpose of a particular statute.

[8] The apparent force of this "tradition of meaning" suggested by petitioners derives in part from their references to municipal control of traffic laws. *See, e.g.*, Petr. Br. 20, 28. As discussed above, however, general traffic laws, like other general laws addressing taxation and universal terms of employment, would not be preempted by 49 U.S.C. § 14501(c)(1) in the first place. *See supra* Section I.A.1.

course of deciding that the regulations at issue were valid because Congress *had not provided* for express preemption or field preemption in FIFRA, and there was no basis for finding implied preemption under the circumstances. *See Mortier*, 501 U.S. at 604-16. Under FIFRA, therefore, state and local governments were operating unencumbered by *any* limitations imposed by federal law and thus by the Supremacy Clause.

As the lower courts have consistently recognized, the statutory framework applicable to motor carriers is significantly different from FIFRA. Unlike FIFRA, this statute *does* contain an express preemption clause, and this provision clearly applies on its terms to *both* state *and* local governments. *See* 49 U.S.C. § 14501(c)(1). Thus, the issue here is not whether preemption should be *inferred* – whether lightly or otherwise – since Congress specifically provided for it.[9] Instead, the issue is how broadly to read a statutory *exception* to an express preemption clause. Hewing to a careful analysis of the statutory text, all but one of the circuit courts have concluded that in the context of this statute, Congress acted purposely by explicitly preempting the authority "of a State" and of a "political subdivision of a State," but then saving only the safety authority "of a State."[10] Since the "ultimate touchstone" in "identify[ing] the domain expressly preempted" is congressional purpose as articulated in

---

[9] Furthermore, the provision interpreted in *Mortier* included no references to political subdivisions whatsoever, *see* 7 U.S.C. § 136v, and FIFRA as a whole contains only "scattered mention" of political subdivisions in its other parts. *See Mortier*, 501 U.S. at 612. That landscape, again, is very different from 49 U.S.C. § 14501, which contains repeated references to "political subdivision[s]" – so much so that this term is invoked *seven times* in the statute, and indeed is used *everywhere but* in § (c)(2)(A). *Id.*

[10] *See Petrey*, 246 F.3d at 560-64; *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999); *Stucky v. City of San Antonio*, 260 F.3d 424, 440-46 (5th Cir.), *reh'g denied*, 266 F.3d 342 (2001), *cert. pending*, U.S. No. 01-1028; *Tocher*, 219 F.3d at 1050-51.

the text of the statute itself, *Lorillard Tobacco*, 121 S. Ct. at 2414, this conclusion is correct for all the reasons discussed herein, and the Court's discussion in *Mortier* does not counsel otherwise. Rather, the statutory scheme here reflects the perspective Justice Scalia stated in his concurrence in *Mortier*: where Congress has provided for preemption *ab initio*, further language such as appears in the saving clause of subsection (c)(2)(A) should be understood "not as restricting certain types of state regulation (for which purpose, it makes little sense to restrict States, but not their subdivisions), but as authorizing certain types of state regulation (for which purpose, it makes eminent sense to authorize States, but not their subdivisions)." *Mortier*, 501 U.S. at 616 (Scalia, J., concurring).[11]

B. Traditional Canons of Statutory Construction Strongly Support Preemption Here.

The ordinary and natural reading of the preemption provisions is bolstered here by several fundamental principles of statutory construction. The traditional canons of interpretation form the accepted baseline for Congress when it crafts its enactments, and thus they constitute part of a close textual analysis of any federal statute. *See, e.g.*, *Rowland v. California Men's Colony*, 506 U.S. 194, 200-01 (1993) ("'It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.'") (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)); *Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of

[11] Petitioners also suggest that Congress should be understood to have legislated in light of *Mortier* when it enacted 49 U.S.C. § 14501(c) a few years later. *See* Petr. Br. 18. As discussed above, however, *Mortier* is readily distinguishable and any such alleged tradition of meaning is far from established. Even more to the point, Congress' own use of the term "regulation" in this very statute is inconsistent with the proposed meaning because it made an explicit distinction between regulations "of a State" and regulations of a "political subdivision of a State." *Id.* § (c)(1).

clear interpretive rules, so that it may know the effect of the language it adopts."). These basic rules thus further illuminate the plain meaning of the statutory provisions that are key to a proper resolution of this case.[12]

1. *The Avoidance of Surplusage.*

The Court has definitively settled that "all the words used in the statute should be given their proper signification and effect." *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (rejecting interpretation which "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"). Indeed, the Court has long embraced as "a cardinal rule of statutory construction" that "significance and effect shall, if possible, be accorded to every word. . . . This rule has been repeated innumerable times." *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879); *see* 2A Norman J. Singer, *Sutherland on Statutory Construction* § 46.06 (6th ed. 2000).

A major problem with the construction advanced by petitioners is that it requires the Court to read out of 49 U.S.C. § 14501(c) a key phrase: "political subdivision." Yet Congress deliberately inserted this term into this law, not once but repeatedly, in order to define the proper boundaries of federal preemption in deregulating the trucking industry nationwide. Petitioners' contention that the authority "of a State" must be read, even in the context of this statute, to include the authority

[12] For all the reasons set forth both above and below, petitioners' hypothetical about the Secretary of the Army, *see* Petr. Br. 24, is inapposite. A more parallel analogy would be where the Secretary enacts a general rule banning all on-duty card playing by military officers, but specifies that generals can play bridge on Tuesdays and all officers can play poker on Fridays. Under this regime, it is clear that generals could not round up captains and lieutenants to fill out their bridge game on Tuesdays.

to delegate its own power to "a political subdivision," would render the latter phrase a complete nullity.[13]

Indeed, if the authority "of a State" inevitably carried with it the absolute discretion to delegate this authority to local and municipal governments, then there would be no necessity and no reason for Congress *ever* to have supplemented its references to state authority in this statute with any additional references to municipal authority. Whenever Congress extinguished the power of "a State," it would have been understood to have also extinguished any such power as delegated to a municipality; and whenever Congress upheld the power of "a State," it would have been understood to have upheld the capacity to delegate this power to local governments. Under this view, use of the phrase "political subdivision" would serve no purpose and convey no independent significance.[14] The same is true, incidentally, of the phrase "political authority of 2 or more States," which likewise appears in both the preemption clause and one of the saving clauses, 49 U.S.C. § 14501(c)(1) & (c)(3), but is rendered void if congressional enactments could not restrain the ability of state governments to delegate their powers in this regard. *See, e.g.*, *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990) ("In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way.").

---

[13] This point also refutes the argument that Congress should be understood here to have "adopted" the Court's interpretation of the term "a State" as construed in *Mortier*. If Congress had done so, there would have been simply no reason for it to employ the term "political subdivision of a State" at all, let alone repeatedly, in the text of 49 U.S.C. § 14501(c).

[14] Although petitioners never avert to this problem directly, they do make one vague and elliptical assertion that by including repeated references to "a political subdivision," Congress "wisely clarified in belt-and-suspender terms the breadth of preemption." Petr. Br. 23-24. Why this redundancy would be wise, and how it would serve to clarify the meaning of the statute, are points that are never explained.

Notably, the Court recently addressed and resolved a very similar problem of statutory construction in the precise fashion urged by respondents here. In *Duncan v. Walker*, 121 S. Ct. 2120 (2001), the Court construed newly enacted language that tolled the period for filing a federal habeas corpus petition during the time when an "application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The Court held that the plain language of this provision did not cover any federal applications, for two reasons. *First*, such a reading of the statute would "render the word 'State' insignificant, if not wholly superfluous," in violation of "our duty to give effect, if possible, to every clause and word of a statute." 121 S. Ct. at 2125 (quotations omitted). As the Court explained further: "If the phrase 'State post-conviction or other collateral review' is construed to encompass both state and federal collateral review, then the word 'State' places no constraint on the class of applications for review that toll the limitation period." *Id.* Precisely the same problem exists here, and it is avoided in precisely the same fashion. *Second*, relying on another "well settled" canon of construction that we discuss in the next section, the Court noted that several related statutes referred instead to "State or Federal post-conviction review" proceedings, and held that Congress must be presumed to act "intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 2124-25 (quotation omitted).

This inescapable problem of surplusage, especially with respect to terms so central to any natural reading of the preemption provisions, undercuts petitioners' construction of the statute. "Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *see also Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (rejecting result that "would contravene the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (internal quotation omitted). The

Court should not do so here, given that neither petitioners nor their *amici* have offered any sensible explanation of why Congress would have repeatedly written the phrase "political subdivision" into the preemption provisions of this statute.

2. *Language Expressly and Repeatedly Used in One Statutory Section But Purposely Omitted Elsewhere in the Same Section.*

Another pertinent canon of statutory interpretation here is that when "Congress includes particular language in *one section* of a statute but omits it in *another section* of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added); *see also Duncan*, 121 S. Ct. at 2124-25. This case presents an even more pointed and forceful application of this standard canon, because in this statute Congress repeatedly used the same language in the same *section* and then notably omitted it from one particular *subsection*. Thus the applicability of this canon is at its zenith.

Recognizing the force of this argument, petitioners and their *amici* deprecate the importance of this rule and attempt to distinguish the *Russello* case either on its facts or in its context of a criminal prosecution. But this time-honored principle for construing statutes transcends the holding in one or another particular case; instead, it is part and parcel of a proper judicial focus that is bound by the specific text of the statute that Congress actually enacted. As the Court has succinctly put the point in addressing an analogous issue of interpretation: "The short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (rejecting suggestion that similar language should be read into successive subsections where it did not appear, in order to render them parallel).

Indeed, the Court has invoked this canon with great frequency, and it has long been established as an essential guide

to determining the plain language of controlling law in a wide variety of cases – civil and criminal, statutory and regulatory, substantive and procedural. *See, e.g.*, *Barnhart v. Sigmon Coal Co.*, 122 S. Ct. 941, 951 (2002) (statute on coal industry retiree health benefits); *Hohn v. United States*, 524 U.S. 236, 250 (1998) (criminal statute); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998) (consumer credit statute); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (Veteran Affairs regulation held inconsistent with controlling statute); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994) (elections statutes); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (bankruptcy statute); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (environmental statute); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (civil jurisdictional statute); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 476 n.10 (1991) (labor statute); *General Motors Corp. v. United States*, 496 U.S. 530, 537-38 (1990) (administrative deadlines); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987) (statutes on futures trading); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (standard of proof for asylum claims); *FTC v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963) (antitrust statute).

Petitioners' contention that the lower courts have erred here by raising this rule "to a primary (rather than a secondary) principle of statutory construction," Petr. Br. 22, does not withstand analysis. Judicial construction begins, as here, from the specific language of the statute as a whole, starting with its express preemption clause before analyzing its subordinate saving clauses. In that posture, it is entirely proper for the courts to proceed to reinforce the plain meaning of the statute by resorting to such basic, accepted canons as avoidance of surplusage and recognition of legislative purposefulness in disparate inclusions and exclusions. *See, e.g.*, *Duncan*, 121 S. Ct. at 2124-25 (employing both canons to determine that, in context of the habeas statutes, the term "State" had a meaning distinct from the term "State or Federal"). Any suggestion that

this approach somehow injects ambiguity into the text of the statute, *see* Petr. Br. 21-22, simply begs the question of what the plain meaning of the statute is in the first place.

This statute also presents an especially appropriate occasion for applying this interpretive rule, since 49 U.S.C. § 14501 contains no fewer than *seven* express references to the regulatory authority of a "political subdivision of a State" in its other subsections, *see id.* §§ (a), (b), (c)(1), (c)(2)(C), (c)(3)(A), (c)(3)(B), and (c)(3)(C), but omits any reference to political subdivisions in subsection (c)(2)(A). In fact, the latter provision is the *only* subsection of the statute that mentions the regulatory authority "of a State" without *also* mentioning the regulatory authority of a "political subdivision of a State." It becomes even more unlikely that this omission can be dismissed as casual imprecision because the parallel express preemption provision for air carriers, in 49 U.S.C. § 41713(b)(4)(B)(I), employs the exact same language. For these reasons, Congress' considered decision to omit political subdivisions from subsection (c)(2)(A) clearly manifests its intent that municipal laws and regulations are not thereby exempted from the preemption effected by subsection (c)(1).[15]

In sum, the "disparate inclusion or exclusion" principle of statutory construction is a fundamental part of the "background of clear interpretive rules" against which 'Congress [must] be able to legislate . . . so that it may know the effect of the

---

[15] Petitioners' effort to explain away Congress' usage of the term "political subdivision" in some of these provisions, including the other saving clauses, *see* Petr. Br. 25, is unpersuasive. Their dismissal of § (c)(2)(C) because it was enacted a year later is discussed below. *See infra* Section I.D.4. Their attempted distinction of § (c)(3)(A) because motor carriers are permitted to "opt out" of those provisions makes no difference whatsoever, because this saving clause is *still* addressed to the "authority of a State" or of a "political subdivision" to enact or enforce laws or regulations in specific areas – which is the precise preemption issue at stake here. *See id.*

language it adopts." *Finley*, 490 U.S. at 556. It therefore should be given its natural and proper effect here.

3. *Exceptions to Preemption Set Forth in Saving Clauses Cannot Swallow Up the Express Preemption Congress Provided.*

Finally, the Court has regularly held that a more general "saving clause cannot be allowed to supersede the specific substantive preemption provision." *Morales*, 504 U.S. at 384-85; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause"); *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (same). Here petitioners urge that the initial saving clause contained in subsection (c)(2)(A) should be construed to uphold municipal authority to impose detailed licensing schemes on any category of motor carriers, including recordkeeping, inspections, identification, and insurance requirements, and annual fees imposed per vehicle and per driver. *See* Pet. App. 36a-47a. In this respect, it bears emphasis that there is *nothing* in the language of either the preemption clause or the initial saving provision that is unique to tow trucks, as among all other motor carriers. Whatever can be done in the name of assuring the safety of tow trucks can also be done in order to promote and ensure the safety of all other motor carriers, which almost universally are bigger, heavier, and more unwieldy than other motor vehicles. This consideration is particularly problematic because, as one court has noted, "under the City's argument there is no stopping point for the potential reach of the safety exception." *Stucky*, 260 F.3d at 446.

The City of Columbus, moreover, is typical of many modern urban areas in that the principal municipality itself extends across three counties and is honeycombed with 26 other incorporated cities and villages, as well as the unincorporated areas of 17 discrete townships. Each of these units operates its own individual form of local government, and thus each has its own potential authority to impose a separate licensing scheme.

See App. A.[16] Allowing local governments to impose such an overlapping web of local licensing schemes on motor carriers such as UPS and FedEx "would be absolutely inconsistent with the provisions of the act." *Abilene Cotton*, 204 U.S. at 446.

C. The Purpose of the Motor Carrier Laws, to Deregulate Interstate and Intrastate Trucking Markets, Strongly Supports Preemption Here.

The consistent arc of federal policy with respect to the motor carrier industry for the past two decades has been toward deregulation of the trucking market and the promotion of competition to benefit consumers. *See supra* pages 3-5. The FAAA Act advanced these goals by deregulating *intrastate* trucking markets, while other measures such as the ICCTA completed the ongoing project of deregulating the *interstate* trucking market. As the Court has stated of the mirror preemption provisions in the air carrier statutes, Congress acted to preempt all state and local laws "related to a price, route, or service of any motor carrier" in order to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378.

The purpose of the FAAA Act was to create a less regulated, more uniform, market-driven economy for those who buy and sell the transportation services of motor carriage. A major problem that Congress confronted was that one participant in the trucking industry – Federal Express, now

---

[16] The Eleventh Circuit has similarly noted that "a tow truck providing consensual towing services from a location in downtown Atlanta to a location in Northwest Georgia may pass through nearly a dozen political subdivisions of the State of Georgia that, under the City Defendants' reading of the statute, would possess the authority to enact safety and insurance regulations for tow truck companies," and "the number of political subdivisions rises dramatically in situations" involving long-haul tows, thereby multiplying the costs, burdens, inefficiencies, and practical problems of complying with all such regulations. *R. Mayer*, 158 F.3d at 546 n.6.

FedEx – had been held to be an "air carrier" that receives the benefits of the broad preemption imposed in the Airline Deregulation Act. *See Federal Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). FedEx thus possessed a competitive advantage over other shippers that remained subject to burdensome state and local regulations. Congress resolved this problem by extending the same broad preemption to *all* motor carriers of property, thereby leveling the playing field by aggressively rooting out such restrictions and substantially deregulating intrastate trucking markets.[17]

The House Conference Report on the FAAA Act explained that the preemption provision for all motor carriers of property "is identical to the preemption provision deregulating air carriers . . . . and is intended to function in the exact same manner with respect to its preemptive effects." H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 85 (1994), *reprinted in* 1994 U.S.S.C.A.N. 1715, 1757. It thus stated that "the conferees do not intend to alter the broad interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines*." *Id.* at 83. And it also cautioned that "[t]he conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." *Id.* at 84.

Congress recognized that the benefits of free competition in the motor carrier industry would be felt by all sectors of the American economy that use truck transportation and thus were important for consumers in virtually every market. *See* 49 U.S.C. § 13101. As the Conference Report elaborated:

> [T]he conferees believe preemption legislation [for the intrastate trucking market] is in the public interest as well as necessary to facilitate interstate commerce.

---

[17] The title of 49 U.S.C. § 14501 – "Federal authority over intrastate transportation" – also shows Congress' express purpose to deregulate the intrastate trucking markets.

> State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets [costing consumers billions of dollars]. . . . *The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.*

H.R. Conf. Rep. No. 103-677, *supra*, at 87, *reprinted in* 1994 U.S.S.C.A.N. at 1759 (emphasis added).[18]

Less than a year later, Congress enacted the ICCTA, which abolished the ICC and completed the project of deregulating the interstate trucking market, which "represents more than $290 billion in gross revenues" and employs "[a]lmost 8 million people." H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 92 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 804. This statute again advanced its deregulatory objectives by ensuring motor carriers would be free of an entangling web of overlapping and contradictory regulations at the federal, state, and local level.

The core congressional policy of deregulation is advanced by broadly preempting state and municipal regulations and saving only state authority to act in the specific areas prescribed

---

[18] The Solicitor General suggests that the reference in the Conference Report to "state economic regulation" is significant both because it does not mention "political subdivisions" and because it focuses narrowly on "economic" regulations. U.S. Br. 22-24. Neither point can control the plain language of the statute itself, which refers to political subdivisions repeatedly and goes beyond mere economic regulation to preempt all laws and regulations "related to a price, route, or service of any motor carrier" of property. 49 U.S.C. § 14501(c)(1); *see, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,119-20 (2001) ("we do not resort to legislative history to cloud a statutory text that is clear" because it is for "Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes") (quotation omitted).

in 49 U.S.C. § 14501(c)(2)(A). Allowing both States and municipalities to escape preemption under the guise of regulating safety could lead to widespread, diverse regulation of motor carriers, precisely what Congress sought to avoid. In June 1997, there were 39,044 counties, municipalities, and townships in this country. *See* 1 U.S. Bureau of the Census, *1997 Census of Governments, Government Organization* V-VII (1999). Most of these entities have broad authority for general governance subject to limitations imposed by the State. Congress thus sensibly concluded that here, as under the antitrust laws, if municipalities were free to act solely on the basis of "their own parochial interests and without regard to their anticompetitive effects," the results would be "at odds with the comprehensive national policy Congress established" in favor of "the efficiency of free markets [engendered by] the regime of competition." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978); *see Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 133 (1991) (finding preemption to secure market efficiencies from rail consolidations sought by Congress).

As the Eleventh Circuit effectively summarized the matter: "it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *R. Mayer*, 158 F.3d at 546. The cost for a towing company – or *any* trucking company – to maintain compliance with different licensing schemes imposed by a multiplicity of political subdivisions would result in the very "inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology" that Congress sought to eliminate by deregulating the intrastate motor carrier industry. H.R. Conf. Rep. 103-677, *supra*, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759. By requiring that safety and insurance ordinances must be enacted on a statewide basis, the costs associated with complying with the ordinances are reduced dramatically, which

is consistent with the policy objectives of the FAAA Act and the ICCTA. The ramifications for a broad range of motor carriers beyond mere tow trucks are spelled out in the amicus briefs.[19]

Finally, it is noteworthy that the ICCTA also explicitly addressed the issue of state and local regulation of towing services by enacting 49 U.S.C. § 14501(c)(2)(C), which saves from preemption "the authority of a State or a political subdivision" only to apply their own laws or regulations "relating to" the *price* of *nonconsensual* towing operations. *Id.*

The House Committee Report's telling explanation of this provision in subsection (c)(2)(C) stated:

> This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and *is not intended to permit re-regulation of any other aspect of tow truck operations*.
>
> The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.

H.R. Rep. No. 104-311, *supra*, at 121, *reprinted in* 1995 U.S.C.C.A.N. 793, 831-32 (emphasis added). Congress thus limited the exception to include only regulations that address the *price* of *nonconsensual* towing, while leaving undisturbed the statute's preemptive effect as it pertains to all other aspects of the towing industry.[20] This discussion thus further confirms

---

[19] *See* ATA Br., Sections B & C; Brief for Amicus Curiae Cargo Airline Ass'n in Support of Respondents, Section I; Brief for California Dump Truck Owners Ass'n Amicus Curiae in Support of Respondents.

[20] As noted prior to passage, "[t]he pending legislation would restore the local authority to engage in regulating the prices charged by tow trucks in non-consensual towing situations. Regulation of routes and services, *as well as regulation of consensual towing*, would still be preempted." 141 Cong. Rec. H15,602 (1995) (statement of Rep. Rahall) (emphasis added).

Congress' intent to preempt any state or local ordinance that regulates consensual towing services. In other words, section 14501(c) reflects Congress' conclusion that local regulation of the towing industry – with the narrow exception of regulations for the price of nonconsensual towing services – disturbs the development of competitive and efficient transportation services.

D. Responses to Petitioners' Miscellaneous Points About the Meaning of the Statutory Text.

Petitioners also offer several other miscellaneous points that are aimed at raising doubts about the proper construction of 49 U.S.C. § 14501(c). None is persuasive.

1. *The Meaning of "Enact or Enforce."*

First, petitioners note that the preemption clause refers to state and local efforts to "enact or *enforce*" any laws or regulations related to the price, route, or service of motor carriers. *Id.* § (c)(1) (emphasis added). They then argue that if the saving clause is not read to save municipal and local authority, then "state safety laws could never be enforced by . . . city or county police officers." Petr. Br. 26-27.

The argument is a red herring. Express preemption clauses typically do not address *who* can enforce *valid* laws; instead, they specify *what kinds* of laws, emanating from *what* branches and levels of government, *are valid* and therefore can be enforced as a general matter. Thus, in a typical case where the court finds that federal law preempts state law, the only consequence is that any such state law is inoperative. But it most assuredly does *not* mean that state law enforcement officers are thereby rendered incapable of assisting in enforcing *valid* federal laws by participating in the investigation and apprehension of violators. The same is equally true here: this preemption clause is not designed or intended to hamstring law

enforcement officials from enforcing *whatever* laws may be valid once the preemption issues have been resolved and clarified.

The language and structure of similar preemption clauses also indicates that petitioners have distorted the purpose and meaning of these statutory terms. The phrase "enact or enforce" is used in this statute *not* to refer to the disparate functions of making the law and executing it, but instead to incorporate the parallel concepts of creating new law and applying existing law. The same sense is conveyed by similar formulations in statutory preemption clauses that the Court has construed in recent years. *See, e.g.*, *Geier*, 529 U.S. 861 ("establish, or to continue in effect" pertinent provisions; later amended to "prescribe or continue in effect"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) ("establish or continue in effect"); *Easterwood*, 507 U.S. 658 ("adopt or continue in force").

Most notably, this understanding is precisely how the Court construed the very same "enact or enforce" language contained in the parallel preemption clause of the Airline Deregulation Act of 1978. There, the Court commented that the "ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *Wolens*, 513 U.S. at 229 n.5 (quoting Brief for the United States as Amicus Curiae); *see also id.* at 239 (O'Connor, J., concurring) ("Consequently, one must read 'no State . . . shall . . . enforce any law' to mean that *no one* may enforce state law" when such law is preempted) (emphasis in original). The supposed anomaly is thus a mirage.

2. *The "Authority of 2 or More States."*

Petitioners also contend that the conceded "deregulatory objective of the statute" would not necessarily be served by construing "State" in § (c)(2)(A) to mean the same thing it must mean in § (c)(1), where it is distinguished *both* from a "political subdivision of a State" *and* from a "political authority of 2 or more States." Petr. Br. 32. In petitioners' view, barring state governments from "aggregat[ing] their power to create regional safety rules for their streets and byways" would "expand, rather than limit, the potential number of motor carrier safety regulations." *Id.*

As a practical matter, however, this abstract hypothetical has nothing to do with the statutory reference to the "political authority of 2 or more States." 49 U.S.C. § 14501(c)(1). Nowhere in the country have two or more States *ever* surrendered their own authority over motor vehicle safety by merging to create a regional authority and ceding it such powers. Instead, this phrase is used in the statute to refer to multi-jurisdictional port authorities that are granted power to regulate particular forms of transportation in areas where political jurisdictions overlap. These entities operate *in addition to* the general authority that each State continues to exercise by regulating motor vehicle safety within its own borders. *See, e.g.*, *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (Virginia-D.C. entity that controls area airports); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (New York-New Jersey entity operates certain transportation facilities about the Hudson River); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (similar entity for port of New York City).[21] In reality, therefore, these entities *are* governmental units that operate in addition to the authority "of a State," and limiting their powers thus *does* eliminate "yet another level of

---

[21] This statutory language originated in the Airline Deregulation Act of 1978, as multi-jurisdictional entities are much more common in the realm of air carriers. *See* 49 U.S.C. § 1305(a)(1) (1988). Further indicating the considered fashion in which Congress employed these phrases, however, the only provision in 49 U.S.C. § 14501(c) that omits reference to the "authority of 2 or more States" is § (c)(2)(C), which concerns tow-truck operations where such multi-jurisdictional port authorities are irrelevant.

regulation," which directly furthers the core deregulatory purpose of the statute. Petr. Br. 32 (quotation omitted).

3. *Route Controls Based on Size, Weight, and Hazardous Cargo.*

According to petitioners, the court below also erred in its statutory interpretation because if each clause of § (c)(2)(A) is read to preserve only the authority "of a State," then municipalities would be preempted from imposing "highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo." *Id.* This is an accurate statement of the consequences of the second saving clause in § (c)(2)(A), but there is nothing incorrect, absurd, or impractical about this provision.

To begin with, this saving provision only operates within the proper sphere of the principal preemption clause. As stated previously, this clause does not encompass general laws such as traffic laws. *See supra* Section I.A.1.[22] In addition, this saving provision only applies to *highway* route controls based on the size or weight of a motor vehicle or its hazardous cargo. There is nothing odd, and certainly nothing absurd, about Congress deciding that it was generally beneficial to preempt intrastate authority to dictate the routes of motor carriers, but then preserving state authority in certain specific areas to control routing on its highways. Each State could thus adopt or continue in effect its own laws controlling such matters on its highways, without the prospect of each local unit of government operating on its own to impose additional routing restrictions on those highways. It is the latter possibility, more so than the former, that would create concerns about impracticality. Those concerns are avoided by upholding the statute's preemption of regulation by local governments, just as the courts have done in applying the federal statutes governing railroad safety. *Cf. Grand Truck W.R.R. v. City of Fenton*, 482 N.W.2d 706, 708-

[22] This provision therefore does not raise any specter that "even municipal one-way-street laws would be preempted." Petr. Br. 28.

09 (Mich. 1992) (statute [now 49 U.S.C. § 20106] construed to prohibit municipal but not state regulation of train speeds to avoid "a patchwork of conflicting local rules"); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237-38 (N.D. Ind. 1987) ("municipal regulation" is "so greatly at odds with the Congressional purpose of uniformity as to need no further argument"); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) (same with respect to predecessor statute), *cert. denied*, 414 U.S. 855 (1973).[23]

4. *Saving Clauses Enacted at Different Times.*

Finally, petitioners seek to explain away the clear thrust of the contrasting language found in the saving clauses of this statute on the grounds that some were enacted not in 1994, but in 1995 and 1998. In this respect, petitioners cite the settled rule that a later Congress cannot simply lay down a definition and impose it retroactively to control the meaning of provisions enacted by an earlier Congress. *See* Petr. Br. 25. But that specific interpretive principle fails to acknowledge the "cardinal rule" in statutory construction that "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King*, 502 U.S. at 221. This rule is regularly and correctly applied without regard to when the different components of a statute were first enacted. *See, e.g., Arkansas Best Corp. v. Commissioner*, 485 U.S. 212, 219 (1988) (construing statutory exclusions "created by Congress in separate enactments spanning 30 years" and concluding that without "any express direction from Congress, we are unwilling to read [the statute] in a manner that makes surplusage of these statutory exclusions") (footnote omitted).

Moreover, Congress consistently used this same phrasing to articulate the bounds of the preemption provisions of several

[23] It should be noted, however, that with respect to the routing of hazardous cargo, in particular, the Hazardous Materials Transportation Act and the FAAA Act could be harmonized either of two ways, though the Court need not decide that issue here. *See infra* pages 45-46.

closely related deregulatory statutes over two decades. In these circumstances, the words come "'freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions, history is a teacher that is not to be ignored.'" *St. Paul Fire Marine Ins. Co. v. Barry*, 438 U.S. 531, 545-46 (1978) (quoting *Duparquet Co. v. Evans*, 297 U.S. 216, 220-21 (1936)).

II. THERE IS NO CONSTITUTIONAL OR OTHER BASIS HERE FOR THE COURT TO STRAIN TO READ AROUND THE EXPRESS PREEMPTION THAT CONGRESS HAS PROVIDED.

Petitioners and their *amici* also offer two arguments that are aimed at securing relief from the plain language of 49 U.S.C. § 14501(c). *First*, the Solicitor General suggests that the Court should defer to the Secretary of Transportation's view that this deregulatory statute does not trench in any way on his delegated authority to determine preemption issues under other regulatory statutes in Title 49, including his evaluation of state and local measures affecting motor vehicle safety. This suggestion must be rejected not only because, as the Secretary concedes, he is given no authority to umpire preemption issues under 49 U.S.C. § 14501, but also because where "the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Second*, petitioners and their *amici* contend that the interpretation of this statute adopted by the majority of the lower courts raises Tenth Amendment concerns and thus should be construed to avoid constitutional doubts. As explained below, we believe this contention is not supported by either precedent or logic, and we thus urge that the law enacted by Congress should be applied according to its terms.

A. This Deregulatory Statute, Which Confers No Role for Any Agency to Decide Preemption, Affords No Basis to Grant Deference to DOT Based on Other Regulatory Statutes.

The Solicitor General frankly acknowledges that neither 49 U.S.C. § 14501 itself nor the FAAA Act "confers rulemaking authority on the Secretary of Transportation." U.S. Br. 27. Because the Secretary has no delegated authority under this statute, there is no basis to defer to his interpretation of its express preemption clause, which is self-executing and makes no provision for any regulatory implementation. Accordingly, the Secretary's bid for judicial deference under *Chevron* must be rejected here.

In *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), the Court addressed the issue of when agency interpretations of federal law are entitled to deference. As the Court noted, "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of 'notice and comment' rulemaking or formal adjudication." *Id.* at 2167. Outside that context, there must be "circumstances reasonably suggesting that Congress ever thought of [particular agency actions] as deserving the deference claimed for them" and thus imparting to them "the force of law." *Id.* at 2173-74. Here, letter memoranda from a DOT employee purporting to interpret the new stand-alone provisions of 49 U.S.C. § 14501(c) are just what they say they are – mere "interpretive guidelines" – and they are not entitled to *Chevron* deference. *See Mead*, 121 S. Ct. at 2173-75; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

This is particularly true with respect to the task of determining the scope of an express preemption clause. As the Court has stated in an analogous context, "Congress has expressly established the Judiciary, not the [Secretary,] as the adjudicator of [preemption] under the statute. A precondition to deference under *Chevron* is a congressional delegation of administrative authority," which again is lacking here under either 49 U.S.C. § 14501(c) or the FAAA Act. *Adams Fruit*

Co. v. Barrett, 494 U.S. 638, 649-50 (1990); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 743-44 (1996) (assuming, without deciding, that "the question of whether a statute is preemptive . . . . must always be decided *de novo* by the courts"); *Medtronic*, 518 U.S. at 512 (O'Connor, J., concurring and dissenting in part) (same).

Moreover, this is not a case where Congress made the scope of preemption turn on the scope of agency regulations. In such cases, Congress has clearly conferred a central role on the governing agency in deciding the extent of preemption under the statute. *See Geier*, 529 U.S. at 874-83 ("Congress has delegated to DOT authority to implement the statute; the subject matter is technical, and . . . . [t]he agency is likely to have a thorough understanding of its own regulation and its objectives"); *Medtronic*, 518 U.S. at 495-96 ("Congress has given the FDA a unique role in determining the scope of [the statute's] preemptive effect," for preemption "does not arise directly as a result of the enactment of the statute," but occurs "only to the extent that the FDA has promulgated a relevant federal 'requirement'"). In this statute, by contrast, Congress gave DOT no role at all. As the Court has held on prior occasions, "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit*, 494 U.S. at 650 (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

At most, then, an informal "interpretive guideline" prepared by officials within the Department of Transportation, in response to questions from the public, is entitled only "to claim respect according to its persuasiveness." *Mead*, 121 S. Ct. at 2168, 2175-77 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (deference depends on "the thoroughness evident in its consideration" and "the validity of its reasoning"). But there is little persuasive force to these memoranda. They are not at all "thorough," for the relevant comments consist of isolated sentences of *ipse dixit* with no supporting reasoning. *See* U.S. Br. 25-26 (quoting DOT interpretive memoranda).

Indeed, these "interpretive" comments do not even purport to *interpret*; they do not analyze or even mention the statutory language of 49 U.S.C. § 14501(c). *See Sloan v. SEC*, 436 U.S. 103, 117-19 (1978) (denying deference because agency failure to analyze statutory authority "lacks power to persuade"). Thus they never come to grips with the plain meaning of the statutory text and do not tackle any of the problems of construction discussed above. *See* Section I, *supra*. *See also, e.g., Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352-56 (2000) (rejecting the Government's position on preemption as inconsistent with the Court's own construction of statute and regulations); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (rejecting construction urged by the Government because, as "our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). Further, the statements carry no formal or legal force, but purport only to be interpretive.

Petitioners and the Solicitor General also note that other regulatory statutes, which predated the enactment of 49 U.S.C. § 14501(c), remain on the books unrepealed and in certain respects touch on areas (safety, highway routing, insurance) that come within the exemptions contained in subsection (c)(2)(A). *See* Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832 (providing for federal regulation of the safety of commercial motor vehicles engaged in interstate commerce); Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-04, 96 Stat. 2154-57 (providing federal grant-in-aid program to the States for regulating the safety of commercial motor vehicles engaged in intrastate commerce); Hazardous Materials Transportation Act, Pub. L. No. 93-633, tit. I, 88 Stat. 2156 (providing for federal regulation of transportation of hazardous materials) ("HMTA"). They contend that because the Secretary is authorized to review and negate state *and local* laws or regulations under the provisions of those *other* regulatory statutes, the text of the express preemption clause in

this deregulatory statute must be construed to authorize municipal regulation under subsection (c)(2)(A). *See* Petr. Br. 29-31; U.S. Br. 16-22.

Their argument is flawed in several respects. First, they err in claiming that Congress' express preemption of certain municipal regulations in subsection (c)(1), coupled with its failure to save them in subsection (c)(2)(A), somehow renders meaningless the Secretary's review authority under these other statutes. *See* Petr. Br. 29; U.S. Br. 19-20. To the contrary, the Secretary retains considerable review authority: he still may assess and negate any state laws or regulations, and he still may assess and negate any municipal regulations that are not expressly preempted by 49 U.S.C. § 14501(c)(1) – either because they do not involve "motor carriers of property" under subsection (c) or because they are not encompassed within the terms of the principal preemption clause ("related to a price, route, or service"). Indeed, as discussed further below, the kinds of general safety requirements imposed by federal law on *all* commercial motor vehicles – like the general safety standards that are imposed on all citizens and vehicles under tort law and traffic regulations – are not within the scope of this preemption clause. *See also* Section I.A.1, *supra*.

Second, the argument also misstates the effect of these other regulatory statutes in important respects. The federal laws and regulations governing the safety of commercial motor vehicles, *see* 49 U.S.C. §§ 31131-47, and the corresponding federal grant-in-aid program to the States, *see id.* §§ 31101 *et seq.*, simply do not govern state and local regulations that target specific segments of the motor carrier industry, such as motor carriers of property or tow truck operators. Instead, they govern only regulations that "apply to all segments of the motor carrier industry (*i.e.*, for-hire and private motor carriers of property and passengers)." 49 C.F.R. § 350.333(a). State and local authority in this realm is thus limited to enforcement of accident-prevention safety regulations that apply to *all* commercial motor vehicles, which is the specific realm of federal

regulation under these statutes. This legislative scheme also accords with the only definition of "motor vehicle safety" provided in Title 49, which is the "performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle." 49 U.S.C. § 30102(a)(8). All of these federal safety laws and regulations are directed to improving the safety performance of motor *vehicles* and motor vehicle *operators* generally – whether commercial or otherwise – and their effect on state and local laws occurs within that orbit.

In this light, it is inaccurate to suggest that the municipal licensing scheme for tow trucks challenged here, as a putative safety measure, remains subject to review and possible negation by the Secretary under these other statutes and thus cannot be preempted under 49 U.S.C. § 14501(c). This licensing program does not apply generally to all commercial motor vehicles, and thus it would not be germane to the Secretary's review authority under 49 U.S.C. § 31141. *See also* 49 C.F.R. § 355.25(a).

The Solicitor General also cites two recent administrative preemption reviews in the realm of hazardous waste transportation, in order to show that municipal authority in this area is not expressly preempted by 49 U.S.C. § 14501(c). *See* U.S. Br. 22 (citing 66 Fed Reg. 37,260 (2001); 66 Fed. Reg. 29,867 (2001)). But those reviews did not discuss preemption under section 14501(c); indeed, in each, DOT carefully noted that its preemption determinations "do not address issues of preemption arising under . . . statutes other than the Federal hazardous material transportation law." 66 Fed. Reg. at 37,262; *id.* at 29,869. A matter in which a particular statutory issue is neither raised nor decided does not constitute an authoritative precedent on that issue.

That being said, there is force to this one narrow argument: the federal hazardous waste transportation laws, which

contemplate state *and* local regulation, *see* 49 U.S.C. §§ 5112(b)(1)(H)(i) & 5125(d)(1), are inconsistent with the second clause of the saving provision of 49 U.S.C. § 14501(c)(2)(A), which permits only "a State" to impose highway route controls based on "the hazardous nature of the cargo." *Id.* Of course, that issue is not raised in this case, and it need not and should not be decided here. *Cf. Egelhoff*, 532 U.S. at 152 (declining to opine on whether "slayer" statutes are preempted by ERISA). In fact, it could be resolved either by construing the later statute (the FAAA Act) to have modified the earlier, *see, e.g.*, *Morales*, 504 U.S. at 384-85, or the more specific statute (the HMTA) could be construed to control within the limits of its particular realm, *see, e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988).

The important point here, however, is that the authority to regulate the safety of motor vehicles under the motor carrier deregulatory statutes, which is preserved only to "a State" in 49 U.S.C. § 14501(c)(2)(A), is not undercut by the provisions of the other federal motor vehicle safety statutes. There is nothing odd or even impractical about the notion that Congress would have decided to reserve only to the States, and not to municipalities and other political subdivisions, the authority to regulate "motor vehicle safety;" impose highway route controls based on size, weight, or hazardous cargo of vehicles; and regulate insurance requirements. Indeed, Congress went even further with respect to insurance requirements, providing in 49 U.S.C. § 14504 that even regulation *by each State* of motor carrier insurance information was too burdensome and thus that single-state registration must be accepted as valid evidence of motor carrier insurance coverage in all other jurisdictions. *See id.* All of this is fully consistent with the core purpose of the motor carrier deregulatory statutes to clear away regulatory impediments and inefficiencies in order to promote competition with its benefits for consumers. *See* Section I.C, *supra*.

In sum, the statute at issue in this case confers no authority on any agency to determine preemption. And the mere fact that

this statute is codified in Title 49 does not endow the Secretary with the ability to inject his judgments about preemption from other *regulatory* statutes in order to alter the scope of the express preemption clause that Congress enacted in this *deregulatory* statute. The terms of this statute cannot be read, and simply could not have been intended, to provide for DOT to serve as the umpire for preemption on a case-by-case basis with respect to licensing schemes imposed on trucks in thousands of local municipalities throughout the country.

B. The Tenth Amendment Does Not Require the Court to Depart from the Plain Language of the Express Preemption Clause.

Petitioners' final argument is that federal preemption of municipal regulations concerning motor vehicle safety would raise Tenth Amendment concerns, and thus at a minimum the Court should impose a "plain statement" rule that they contend is not met in this case. *See* Petr. Br. 34-38. The premise of the argument is that it is unusual and unjustified for Congress to exercise its authority to preempt state or local law by "dictat[ing] the state processes for legislating" – in this instance, by prohibiting a State from delegating authority to its political subdivisions. *Id.* at 34. The *amici* go further, arguing that such federal legislation cannot constitutionally be enacted at all under the Tenth Amendment or even the Commerce Clause. *See, e.g.*, Cities' Br. 13-17; CLS Br. 3-24.

These arguments are out of step with the Court's precedents. First, it is settled that Congress *does* have the power under the Constitution to legislate in this manner. In *Geier*, for example, the Court parsed the provisions of the federal motor vehicle safety laws and concluded that these statutes expressly preempted state statutes and regulations, but did not expressly preempt (and only in some instances impliedly preempted) state common-law claims. *See* 529 U.S. at 867-74. In other words, the Court construed the federal statute to preempt state legislation and state executive regulation, but not necessarily to preempt state judicial action based on the

common law. Nothing in the Court's opinion suggests that the resulting schematic was unusual or unjustified, and the Court neither mentioned any constitutional concerns nor suggested that a "plain statement" rule was needed in this posture. A plurality of the Court reached precisely the same conclusions in the *Medtronic* case, which again raised no apparent constitutional concerns. *See* 518 U.S. at 486-91 (Stevens, J.).

Moreover, the Court reached a similar but even more complicated conclusion in *Wolens*, a case that arose out of virtually the same express preemption clause at issue here. There the Court held that the airline deregulation statute "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 222. The upshot was that statutory enactments were preempted, but judicial actions based on the common law of contracts were not, *except* that where the latter claims invoked independent policy concerns embedded in state common law, those policies could not be applied to define the terms of the parties' agreement. *Id.* at 226-33.

In each of these cases, therefore, the Court's preemption rulings readily ratified Congress' handiwork by upholding statutes that permitted the States to act only through their courts but not through legislation or regulation. Presumably one could view this result as "dictat[ing] the state processes for legislating," Petr. Br. 34, but that is not the proper way to view federal preemption under the Supremacy Clause. Indeed, in every one of these cases the Court approached its task in determining preemption simply as one of pure statutory construction, without imposing any plain statement rules or suggesting any lurking constitutional concerns.

These decisions are also in harmony with established Tenth Amendment jurisprudence. The Court has held that Congress cannot "commandeer" state governments and state officials, either by requiring them to pass legislation, *see New York v. United States*, 505 U.S. 144 (1992), or by conscripting them to implement and enforce federal law, *see Printz v. United States*,

521 U.S. 898 (1997). But Congress' exercise of its power to preempt state and local law by "impos[ing] preconditions to continued state regulation of an otherwise pre-empted field," *id.* at 929, does neither. Instead, it merely calibrates the balance of authority by specifying which areas and categories of state and local law are superseded by federal law under the Supremacy Clause. This action does not blur political accountability or "compromise the structural framework of dual sovereignty." *Id.* at 929-32. *See also* TRAA Br., Section I.

Indeed, enactments such as 49 U.S.C. § 14501(c) are *more* respectful of federalism than the fulsome across-the-board preemption of state and local law that petitioners and their *amici* concede would be well within congressional authority. *See* Petr. Br. 34. Virtually all of the *amici* concede that Congress would have the power to occupy the field of motor carrier regulation by preempting *all* state and local law. *But see* CLS Br. 3-24.[24] Yet if Congress were to determine that federal objectives could be satisfied with a more limited invalidation of existing law, and thus were to allow state law to remain intact while preempting only the larger web of local regulations, the illogical argument presented here is that this more deferential approach to preemption would violate principles of federalism. The Solicitor General explicitly addressed this very argument in *Mortier*, and urged the Court to reject it, even though it was raised by the party on the same side of the case:

---

[24] The federal statutes deregulating the motor carrier industry nationwide were properly enacted pursuant to Congress' authority under the Commerce Clause, based on its considered view that these intrastate activities "substantially affect interstate commerce," for the Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This is also clearly a situation in which "the [de]regulatory scheme could be undercut unless the intrastate activity were [preempted]." *Id.* at 561.

> [T]here is no contention here that Congress is not constitutionally empowered to prohibit *all* state and local regulation of the particular subject matter involved in this litigation. The claim, instead, is that, if Congress concludes that a multiplicity of local regulation would be incompatible with the purpose and operation of the federal program, Congress must also preclude state-wide regulation in order to achieve that result even though it believes that state-wide regulation should be permitted. *Such a contention stands the Tenth Amendment on its head.*

Brief for United States as Amicus Curiae 23 n.21, *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (U.S. No. 89-1905) (second emphasis added). The same is true here.

For these reasons, the circumstances of this case do not give rise to constitutional doubts under the Tenth Amendment. In the end, the only real question is whether Congress wielded the power it clearly had, which presents a pure issue of statutory construction. No plain statement rule or other basis exists here to justify a departure from the customary task of interpreting and applying the plain meaning of the statutory text. And in any event, the language of this statute governing preemption is plain, for all the reasons discussed previously. *See* Section I, *supra*.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

March 2002

APPENDIX A

Population Data for Franklin County, Ohio*

Townships		*Incorporations*	
Blendon	9,596	Bexley	13,293
Brown	2,016	Brice	106
Clinton	4,580	Canal Winchester	3,722
Franklin	13,528	Columbus	701,426
Hamilton	4,419	Dublin	24,976
Jackson	4,849	Gahanna	34,503
Jefferson	4,450	Grandview	7,027
Madison	13,216	Grove City	25,129
Mifflin	663	Groveport	3,573
Norwich	4,135	Harrisburg	357
Perry	4,587	Hilliard	21,064
Plain	2,667	Lockbourne	283
Pleasant	6,867	Marble Cliff	652
Prairie	17,555	Minerva Park	1,683
Sharon	1,994	New Albany	3,361
Truro	1,645	New Rome	116
Washington	1,790	Obetz	3,876
		Pickerington	8,035
		Reynoldsburg	31,466
		Riverlea	515
		Upper Arlington	35,921
		Urbancrest	955
		Valleyview	604
		Westerville	34,948
		Whitehall	20,675
		Worthington	15,059

* Source: *Road Atlas of Franklin County, Ohio* (2000).

Supreme Court, U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

(11)

No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street,
Suite 200
Columbus, Ohio 43215
(614) 645-7385

JEFFREY S. SUTTON
(*Counsel of Record*)
TRACI L. LOVITT
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Am. Airlines v. Wolens, 513 U.S. 219 (1995) 12, 17, 20
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 15
City of Cincinnati v. Reed, 500 N.E.2d 333 (Ohio Ct. App. 1985) 13
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 12
Field v. Mans, 516 U.S. 59 (1995) 3
Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) 12
Gregory v. Ashcroft, 501 U.S. 452 (1991) 1, 18, 19
Gutierrez v. Ada, 528 U.S. 250 (2002) 5
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 12, 20
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 17
Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991) 19
Ohio Mfrs. Ass'n v. City of Akron, 801 F.2d 824 (6th Cir. 1986) 5
Perry v. Sinderman, 408 U.S. 593 (1972) 20
Ruckelhaus v. Monsanto Co., 467 U.S. 986 (1984) 9
Russello v. United States, 464 U.S. 16 (1983) ..... *passim*
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 15
Speiser v. Randall, 357 U.S. 513 (1958) 20
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028) 7
United States v. Bass, 404 U.S. 336 (1971) 19
United States v. Powell, 379 U.S. 48 (1964) 5
United States v. Vonn, 122 S. Ct. 1043 (2002) 4, 9
Wis. Dep't of Health & Family Serv. v. Blumer, 122 S. Ct. 962 (2002) 15

TABLE OF AUTHORITIES
(continued)

Page

Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) ..... *passim*

Federal Statutes & Regulations

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ..... 16, 17
Federal Aviation Administration Authorization Act, Pub. L. No. 103-305, 108 Stat. 1569 (1994) ..... *passim*
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 13
Transportation Code (49 U.S.C.)
§ 5112 7
§ 5112(b)(1)(H)(i) 9
§ 5125(d)(1) 9
§ 13102(9) 10
§ 14501(c)(1) ..... *passim*
§ 14501(c)(2)(A) ..... *passim*
§ 14501(c)(2)(C) 15
§ 14501(c)(3)(A) 4
§ 31100 ..... 9, 10
§ 31101 9
§ 31101(1) 14
§ 31102(b)(1)(O) 8, 10
§ 31104 9
§ 31104(f) 8, 10
§ 31104(h) 14
§ 31111 ..... 7, 11
§ 31114(b) 11
§ 31131 ..... 7, 9
§ 31132(8) 8
§ 31132(9) 8
§ 31138 7
§ 31141(c) 14

TABLE OF AUTHORITIES
(continued)

	Page
§ 31147(a)	10
49 C.F.R. pt. 350	9
49 C.F.R. § 350.333(a)	15
49 C.F.R. § 350.335(d)	14
49 C.F.R. pt. 355	9
49 C.F.R. § 355.25(a)	15
49 C.F.R. § 355.3	14

Other Federal Legislative Material

H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715	7

State Statutes & City Ordinances

Cal. Civ. Code § 22.2 (West 2002).	19
Colo. Rev. Stat. Ann. 2-4-211 (West 2001)	19
Fla. Stat. Ann. § 2.01 (West 2001)	19
Neb. Rev. Stat. Ann. § 49-101 (Michie 2001)	19
Ohio Const. art. XVIII, § 3	2
Ohio Rev. Code Ann. § 715.22	2
Ohio Rev. Code Ann. § 723.01	2
Ohio Rev. Code Ann. § 4921.02(A)(8)	13
Ohio Rev. Code Ann. § 4923.02(A)(10)	13

Miscellaneous

Webster's Third New Int'l Dictionary (1968)	11

Of all the principles competing for acceptance in this case, four stand out after two rounds of briefing:

(1) the natural meaning of "safety regulatory authority of a State," 49 U.S.C. § 14501(c)(2)(A), encompasses the States' "absolute discretion," *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991), to delegate authority to their agencies, cities and other components of state government;

(2) the *Russello* negative inference does not trump this accepted reading (a) because Congress had ample reasons for specifying the roles of "political subdivisions" in other provisions of the 1994 FAAA Act and for not doing so in § 14501(c)(2)(A) and (b) because the animating objective of the provision was not separately to empower States (or cities) in the covered areas but to incorporate and preserve 60 years of *separate* federal legislation on these topics, which contemplate state *and* local regulation;

(3) the authority of the Department of Transportation to preempt local regulations that unduly interfere with interstate commerce confirms that the cooperative federalism embraced by these laws will not impede the wheels of commerce; and

(4) even if doubt lingers about the meaning of the provision, respondents have not overcome the interpretive imperative that whatever power Congress has "to prohibit the delegation of state regulatory authority to municipalities," the cities, States and United States agree that it "'is a power that [the Court] must assume Congress does not exercise lightly,'" and in this case there is no compelling indication that Congress exercised any such power. U.S. 16 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

1. By providing that the preemption provision "shall not restrict" the "safety regulatory authority of a State," § 14501(c)(2)(A) plainly allows States to continue to delegate power to state agencies and municipalities. The tow-truck companies do not dispute that the term "State" by

itself normally encompasses a delegation of state power. Indeed, they acknowledge (Resp. 20) that *Mortier*'s holding on this point is an "unexceptional" one. Nor do they dispute that the reference to "regulatory authority" normally encompasses a delegation of power. Indeed, the other federal laws upon which they rely (*id.* 19-20) all contemplate delegations of power.

Respondents also do not counter the argument of the United States (U.S. 16-20) that the court of appeals' decision fails to respect the first command of § (c)(2)(A)—that "Paragraph (1)," the preemption provision, "shall not restrict" the safety regulatory power of the States. Prior to 1994, Ohio exercised its authority to regulate tow trucks by delegating responsibility to city governments, including the City of Columbus. *See* Ohio Const. art. XVIII, § 3; Ohio Rev. Code §§ 715.22, 723.01. According to respondents, however, the 1994 FAAA Act barred Ohio from continuing to dispense power in this way. That interpretation thus not only overlooks the ordinary meaning conveyed by a preservation of the "regulatory authority" of a "State," but also fails to respect the "shall not restrict" language of the provision.

Under these circumstances, it makes no difference whether the preemption provision is "broad" or "not all-encompassing," as respondents variously argue (Resp. 11). By the statute's explicit terms, the preemption provision "shall not restrict" the "State[s']" safety "regulatory authority"—which is why respondents ultimately turn to context.

2. While the context in which a phrase appears may fortify its traditional meaning, it may not alter that meaning. In the opening briefs, the City showed (Pet. 21-22) that *Russello v. United States*, 464 U.S. 16 (1983), was an interpretive aid of secondary, not first, resort, and the United States showed (U.S. 13-14) that in *Russello* itself the negative inference was used to "fortif[y]," 464 U.S. at 22, not to

overcome, the customary meaning of the terms at issue. While respondents dispute the point, they are unable to identify a single case from this Court in which the accepted meaning of a term was altered by the context in which it appeared or in which the Court *began* its analysis by considering context. Because "the negative pregnant" created by silence in one section of a statute but not another is not an "interpretive trump card," *Field v. Mans*, 516 U.S. 59, 67 (1995), respondents' reliance on *Russello* is unavailing.

3. Congress had ample reasons to specify the role of political subdivisions in some provisions of the 1994 FAAA Act but not in others. Respondents also fail to answer a second reason why *Russello* does not apply here: In drafting the 1994 FAAA Act, Congress had legitimate reasons for specifying the role of "political subdivisions" in some provisions but not in others. Respondents do not dispute this limitation on *Russello* but simply say in two footnotes that it is inapplicable here. They initially claim (Resp. 24 n.14) not to understand why Congress would clarify that the preemption provision applies to ordinances enacted by "political subdivisions." But the existence of a presumption against preemption is exactly why a legislature would use such specificity in the preemption provision. While this backdrop gave Congress a legitimate reason for tying a double rather than a single statutory knot in describing the breadth of preemption, it had no comparable reason for doing the same when it came to preserving a 60-year history of state and local safety regulations. How such safety authority would be implemented had long been, and continued to be, a matter for the States to decide in the first instance. Whether out of respect for a co-equal branch of government and its "well settled" authority to delegate power to its constituent parts, *Mortier*, 501 U.S. at 607-08, or out of concern that specifying a city's power to enact safety regulations could be construed to trump the contrary directives of a State's legislature, Congress ultimately had ample reasons for specifying

"political subdivisions" in the preemption provision but for not doing so in preserving the safety authority of the States.

Also unavailing is respondents' answer to the only other component of the 1994 FAAA Act that specifies political subdivisions—§ (c)(3)(A). There, as the City explained (Pet. 25), Congress named various laws that could be enacted by political subdivisions and States because this subsection was designed to benefit motor carriers, not States or cities. The specificity was needed to ensure that motor carriers could make these various laws applicable to them on a retail (city-by-city) rather than solely on a wholesale (State-by-State) basis. Respondents' acknowledgment (Resp. 28 n.15) of this explanation re-states the point but does not answer it.

Given these legitimate explanations for Congress's word choice, it makes no difference whether one views *Russello* as an interpretive aid of first or secondary resort. For there is no dispute that "the canon . . . is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 122 S. Ct. 1043, 1049 (2002). Here, once it is established that Congress had ample reasons for mentioning "political subdivisions" in some portions of the 1994 Act but not in others, respondents are left only with silence, not a negative pregnant and not negative inferences. And that silence cannot overcome the natural meaning of "safety regulatory authority of a State," which Congress did "not restrict" in the 1994 Act.

4. The City's interpretation does not create impermissible surplusage. In a variation on a theme, respondents separately argue (Resp. 23-26) that the City's reading creates redundancy in the preemption provision. In one respect, they are partially correct. In drafting § (c)(1), Congress was not *required* to specify that in addition to laws enacted by "States," those enacted by "political subdivisions" would be preempted. The preemption of "State" laws

generally will suffice to preempt laws enacted by cities regarding the same subject matter. But the specificity was not practically superfluous. The existence of the presumption against preemption, as well as the decision of at least one lower court, *see Ohio Mfrs. Ass'n v. Akron*, 801 F.2d 824, 828-31 (6th Cir. 1986), provided ample reason to "emphasize" the political bodies covered by § (c)(1). *See United States v. Powell*, 379 U.S. 48, 56 (1964). To be sure, as the Court has remarked in rejecting a similar surplusage argument, the role of the disputed term "may not be very heavy work for the phrase to perform, but a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000).

Respondents' interpretation, at any rate, fails to remove a similar redundancy. If they are correct that the references to "State" and "political subdivisions" in § (c)(1) are redundant, then it is assuredly also true that the references to "State" and "2 or more States" in the same provision are redundant as well. When Congress bars States from doing something singly, it also bars them from doing it collectively. Either way, some redundancy thus is afoot in the statute, and neither proffered reading will cure it. This is simply a situation in which the drafter of the statute chose to emphasize that not just States, but political subdivisions of States and political aggregations of States as well, were prohibited from regulating in this area. Yet in emphasizing the political bodies covered by preemption, the drafter no more altered the customary meaning of "safety regulatory authority of a State" than the author of "Equal Justice Under Law" altered the customary meaning of "justice under law."

5. The broader context in which "safety regulatory authority of a State" appears bolsters this reading. The tow-truck companies' contextual and surplusage arguments not only fail on their own terms but also ignore the broader context in which these terms appear. While arguing that the meaning of "safety regulatory authority of a State" should be

determined in the context of specific mentions of "political subdivisions" in other components of § 14501, they see no relevance to the use of the term "State" in the statutory findings, in pre-existing federal laws regarding "safety," or in the motor carrier laws preserved by § 14501(c)(2)(A). This is not only inconsistent but ignores the more illuminating comparisons.

Respondents and their *amici*, for example, offer no response to the argument (Pet. 28-29) that the congressional findings of the 1994 FAAA Act use "State" to encompass state delegations of power. Recall that those findings, like the legislative history, never mention political subdivisions but provide only that "certain aspects of the *State regulatory process* should be preempted" and that "[t]he *regulation* of intrastate transportation of property by the *States*" has imposed a burden on interstate commerce. FAAA Act, Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis added). Under the tow-truck companies' interpretation, it would follow (implausibly) that the law's purpose has nothing to do with preempting city ordinances regarding prices, routes and services. Context is not a one-way street.

Just as significantly, the lineage of the "safety" provision and the other matters covered in § (c)(2)(A) show that they merely incorporate and preserve 60 years of existing state regulatory authority provided in other provisions of Title 49. *See* Pet. 24; U.S. 16-22. Notably, respondents do not contest this point—which is significant for two reasons.

First, this preservation of pre-existing limitations on state and municipal legislation defeats one of the tow-truck companies' main arguments. According to respondents, the City "urge[s] that the initial saving clause contained in [§] (c)(2)(A) should be construed to *uphold* municipal authority to impose detailed licensing schemes on any category of motor carriers." Resp. 29 (emphasis added). But

that is not our position or the position of the United States. "[T]o construe the phrase 'authority of a State' in [§] 14501(c)(2)(A) to encompass delegations of power to municipal governments," as the United States helpfully explains (U.S. 17), "would not leave municipal regulation in the defined areas unconstrained by federal law. It simply means that the propriety of municipal regulation regarding those matters is to be determined by reference to other federal statutory provisions that specifically address preemption in the pertinent subject areas."

Both the text of the statute and its legislative history support this reading. As a matter of text, § (c)(2)(A) says "Paragraph (1)"—namely § (c)(1)—"shall not restrict" the authority of a "State" over certain subject matters, including safety. What States could do before 1994 in these enumerated areas, in other words, they could do after passage of the law—including delegating their power. The provision thus incorporates a comprehensive statutory scheme found elsewhere in Title 49 on these topics—for example, safety, 49 U.S.C. §§ 31131-31137, route controls for hazardous materials, §§ 5112-5125, size-based route controls, §§ 31111-31115, and minimum financial responsibility, §§ 31138-31139.

As a matter of legislative history, the Conference Report could not have been more clear. It explains that "nothing in [§ 14501(c)(2)(A)] amends other Federal statutes that govern the ability of States to impose safety requirements, hazardous materials routing matters, truck size and weight restrictions or financial responsibility requirements." H.R. Conf. Rep. No. 103-677, at 84 (1994). And it adds that the Act leaves state authority in these areas "unaffected," *id.*, and "unchanged," *id.* at 85. *See* Pet. 33-34; U.S. 17 & n.3.

Contrary to the view of respondents and of some courts of appeal, *see Stucky v. City of San Antonio*, 260 F.3d 424, 446 (5th Cir. 2001) ("under the City's argument there is no

stopping point for the potential reach of the safety exception"), the City's reading of § (c)(2)(A) does not "swallow up the express preemption Congress provided." Resp. 29. The section was not designed to create new inroads on preemption but simply to preserve the role of State and local governments, for better or worse, that already existed. One of respondents' *amici* accepts this view. *See* Cargo Airline Ass'n 9.

Second, this interpretation offers still another reason why the drafters of § (c)(2)(A) would have used only the word "State" in describing the areas of motor-carrier legislation left unaffected by the 1994 FAAA Act. The point of the provision was merely to identify the *subject matters* of motor-carrier legislation left unaffected by preemption, not to describe the *political bodies* that could legislate in the area. Anyone interested in determining the nuts and bolts of how States regulated in these enumerated areas would have to read the relevant sections of Title 49, which not only contemplate regulations by States *and* municipalities, *see* 49 U.S.C. §§ 31102(b)(1)(O), 31104(f), 31132(8), 31132(9), but also provide for DOT review of all such laws to ensure that they do not impose an undue burden on interstate commerce. Against this backdrop, it is difficult to maintain that this provision—which is entitled "Matters Not Covered" and says the preemption paragraph "shall not restrict" the "regulatory authority" of States on these specified topics—was designed to dictate the political bodies that may regulate in the area. One of respondents' *amici* attempts to counter this point (Towing and Recovery Ass'n 16) by pointing to 1995 and 1998 motor-carrier legislation subsequently codified in § 14501, but fails to explain why these later-enacted laws may tenably explain the meaning of this 1994 legislation, let alone do so through the most indirect of implications.

6. The tow-truck companies' interpretation causes more interpretive problems than it solves. Rather than embrace this sensible reading of the statute's terms and the modest role § (c)(2)(A) plays in preserving other directives of

Title 49, respondents raise a series of arguments that make reconciling this subsection with the rest of the Title virtually impossible—and hopelessly difficult to anticipate through the lens of this single case.

Hazardous materials. One such problem has been acknowledged. As respondents to their credit admit, their interpretation of § (c)(2)(A)—that States, but not their political subdivisions, may enact laws on the enumerated matters—cannot readily be reconciled with the provisions of Title 49 addressing hazardous-materials route regulations. For "the federal hazardous waste transportation laws," respondents concede (Resp. 45-46), "contemplate state *and* local regulation." *See* 49 U.S.C. §§ 5112(b)(1)(H)(i), 5125(d)(1). The only reconciliation available is to say that the later provision repealed by implication the earlier one. But the statute and legislative history make quite clear that this is exactly what the 1994 FAAA Act did not do. Repeals by implication, at all events, are highly disfavored and require far more specificity than the negative inferences that respondents invoke here. *See, e.g., Vonn*, 122 S. Ct. at 1050; *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1017-18 (1984).

Safety. A similar problem exists in the area of safety. *See* Pet. 9-12. Before 1994, 60 years of federal legislation preserved the role of States (and cities) in regulating local "safety" issues. By referencing that subject in § (c)(2)(A), Congress perpetuated the continuing power of the States (and their cities) in this area as well as the continuing restrictions over them under other provisions of federal law. 49 U.S.C. §§ 31100, 31101, 31104, 31131-31137; 49 C.F.R. pt. 350, pt. 355. Respondents do not answer this point—except to offer (Resp. 12-13, 20 n.8, 44) a complex reading of the preemption provision by which it does not apply to general traffic laws. The multiplicity of interpretive steps required to accept this reading, however, stands in marked contrast to the straightforward construction offered by the City. Namely, § (c)(2)(A) merely incorporates the existing federal safety

laws, which contain a provision that addresses this point. Those laws provide, in a section entitled "Traffic regulation," that DOT may not "prescribe traffic regulations or preempt State traffic regulations." 49 U.S.C. § 31147(a).

But even if respondents were somehow correct—that the preemption provision by its terms does not cover general traffic laws—the preemption and safety provisions still would affect *some* laws applicable to motor carriers, and that raises the question whether § (c)(2)(A) meant suddenly to repeal the States' statutory authority to delegate safety police power to their political subdivisions. As to that, all respondents can do is mention the references to "political subdivisions" in other parts of the 1994 FAAA Act, which in their view partially repealed decades of cooperative national, state and local federalism in this area. Such a repeal by implication makes scant sense here not only because of the legitimate explanations for Congress's word choice but also because of later congressional directives. In 1998, Congress enacted § 31100, which declared that the purpose of the federal safety laws—*i.e.*, the laws referenced in the safety exception—is "to ensure that the Secretary, States, and other political jurisdictions work in partnership to establish programs to improve motor carrier, commercial motor vehicle, and driver safety to support a safe and efficient transportation system." 49 U.S.C. § 31100; *see also id.* §§ 31102(b)(1)(O); 31104(f).

Size and weight. Respondents next suggest (Resp. 38) that Congress signaled its desire to allow only state legislatures to enact size and weight routing provisions when it described the preserved power as "the authority of a State to impose *highway* route controls or limitations based on the size or weight of the motor vehicle." 49 U.S.C. § 14501(c)(2)(A) (emphasis added). Because the provision "only applies to *highway* route controls," respondents argue (Resp. 38), there is nothing odd about preserving state authority "on its highways," but not as to other roads within a State. Yet, for purposes of this section, "highway" means a "road, highway,

street, and way in a State," 49 U.S.C. § 13102(9), and thus covers all roads in a State, not just state highways. Far from signaling that only state legislatures could pass such laws, the definition of "highway" contemplates that size and weight controls on routes would be enacted at the state and local level—just as Congress had permitted before 1994 and just as it permits today. *See generally* 49 U.S.C. §§ 31111-31115; *see* 49 U.S.C. § 31114(b) ("This section does not prevent a State or local government from imposing reasonable [access] restrictions, based on safety considerations.").

Nor do respondents improve their position by arguing (Resp. 38) that the preemption provision "does not encompass general laws such as traffic laws." *All* weight and size restrictions on local roads, bridges, and tunnels presumably are generally applicable. It would make little sense to create a height restriction for a tunnel, a weight restriction for a bridge, or a size restriction for a narrow road applicable only to *some* vehicles. If, as respondents argue, the preemption provision does not apply to these types of local size and weight route restrictions, then this aspect of § (c)(2)(A) is surplusage.

Enact or enforce. Because the preemption provision bars state and local efforts to "enact or enforce" laws relating to the prices, routes or services of motor carriers, the City reasoned (Pet. 26-27) that respondents' interpretation would bar *any* local enforcement of state laws in these areas, creating a novel law-enforcement vacuum. Respondents disagree. To their eyes, the phrase "enact or enforce" was not meant to convey its traditional meaning—*e.g.*, "to establish by legal and authoritative act: make into a law" or "to put in force: cause to take effect." *See Webster's Third New Int'l Dictionary* 745, 751 (1968). Rather the words were designed "to incorporate the parallel concepts of creating new law and applying existing law." Resp. 36. But they offer no support, whether statutory or dictionary definitions, indicating that this is how Congress traditionally uses these terms. The cases they cite,

moreover, illustrate exactly how Congress would have drafted the law had it intended this meaning. *Id.* at 36 ("*See, e.g.*, *Geier*, 529 U.S. 861 ("establish, or to continue in effect" pertinent provisions; later amended to "prescribe or continue in effect"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) ("establish or continue in effect"); *Easterwood*, 507 U.S. 658 ("adopt or continue in force").). The linguistic gymnastics needed to reach their interpretation, moreover, turn on the very belt-and-suspenders draftsmanship that respondents elsewhere decry. If they are willing to tolerate the redundancy created by their construction of "enact or enforce"—"enact" by itself would normally suffice to bar all laws—it is difficult to understand why they are unwilling to tolerate the more justifiable redundancies created by the City's reading.

Nor does *American Airlines, Inc. v. Wolens* advance this interpretation. 513 U.S. 219 (1995). Not one of respondents' quotations from the opinion (Resp. 36) addresses, much less contradicts, the City's interpretation. And with good reason: At issue was whether a *private* citizen could *enforce* a private contract, not whether a governmental body could enforce a law. *Wolens* construed "enforce" to "connote[] official, government-imposed policies, not the terms of a private contract" and as "most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *Id.* at 229 n.5. That interpretation of "enforce" undermines rather than bolsters respondents' argument.

All that respondents ultimately have to support this limitation on "enforce" is an instinct, which the City shares: Congress could not possibly have meant to eliminate the traditional role of local law enforcement in enforcing state safety laws. But the more natural way to dignify that instinct and ultimately to respect Congress's stewardship over this area is to give "safety regulatory authority of a State" its traditional meaning. And that is all the more true when one considers the result of respondents' extensive labors—first to construe a *federal* statute to dictate that only *state legislatures*

may enact laws related only to *intrastate* commerce, then to enter a labyrinth of reconciliation problems regarding the meaning of § (c)(2)(A) relative to other matters in Title 49.

Mortier, it would seem, marks the more straightforward path. And in reaching its interpretation of "State," *Mortier* recognized what the City has asked the Court to recognize here—that one of the anomalous results of interpreting "State" to exclude political subdivisions is that it "would prohibit local enforcement authority altogether." 501 U.S. at 609.

7. The City's interpretation fully respects the deregulatory purpose of the 1994 FAAA Act. Respondents further claim (Resp. 33) that authorizing state and city safety regulations will undermine the deregulatory objective of the 1994 law and ultimately risk the creation of 39,000 different laws zig-zagging across the country. This is hyperbole and misconceives the way state governments work.

To begin, it is difficult to see why the deregulatory purpose of the 1994 FAAA Act, which covers *intrastate* motor carriers, requires this unusual divestiture of state power when the deregulatory purpose of the 1980 Motor Carrier Act, which covers *interstate* motor carriers, did not require a comparable divestiture of state power. Pet. 10-11. That inconsistency by itself undermines respondents' deregulatory-purpose argument.

Nothing about the City's position, moreover, precludes motor carriers from obtaining uniform laws from their state legislatures. Just as Congress may preempt state and local laws, state legislatures may preempt local laws within the State in a given area. The State of Ohio, for one, has already done just that—preempting some local motor carrier laws but allowing laws covering tow trucks. Ohio Rev. Code Ann. §§ 4921.02(A)(8), 4923.02(A)(10); *City of Cincinnati v. Reed*, 500 N.E.2d 333 (Ohio Ct. App. 1985). Uniform state laws in any of these areas, it turns out, may indeed be enacted by state

legislatures. Congress, however, did not make that choice for the States, but instead left it to them in the first instance.

For much the same reason that the City's interpretation still *permits* uniform safety and other laws within a State, respondents' state-law-only interpretation by no means *compels* uniformity in these areas. Even under respondents' interpretation, States still would be permitted to enact safety laws that differed in substance within the State depending on the region of the State or more likely the size of the city. Since Congress nowhere indicated that the state laws in these areas must be uniform throughout the State—something it assuredly would have done had uniformity been its goal—the threat of a hodgepodge of differing restrictions within each State remains even under respondents' interpretation.

8. Any remaining deregulatory concerns are removed by DOT's review authority over state and municipal laws in these areas. The final confirmation that the deregulatory function of the 1994 Act will not be side-tracked by the City's position is that DOT retains authority to review *interstate* and *intrastate* safety, routing and insurance requirements passed by States and cities. This extant authority not only shows that Congress expected that States and cities would enact laws in these areas, but it also deflates the risk of burdensome local regulations.

In arguing otherwise, respondents claim (Resp. 44) that DOT's review authority does not apply here because it does "not govern state and local regulations that target specific segments of the motor carrier industry, such as motor carriers of property or tow truck operators." Not true. Congress gave DOT review authority over all "laws or regulations on commercial motor vehicle safety." 49 U.S.C. § 31141(c). *See also* 49 U.S.C. §§ 31101(1), 31104(h). And the applicable regulations reach the same conclusion. 49 C.F.R. § 355.3; 49 C.F.R. § 350.335(d). Respondents have no tenable support for their contrary argument. They offer no statutory citations

and initially rely on just one regulation, *id.* § 350.333(a). That regulation, however, addresses "guidelines for the compatibility review" of state and municipal laws by DOT, *id.*, then explains the standards for determining whether a state or local ordinance is compatible, incompatible or incompatible but within an exemption provided by DOT. This particular regulation, and the only other one cited (*id.* § 355.25(a)), plainly demonstrate that DOT *may* review state and local laws in this area.

9. The agency's views warrant *Chevron* deference in some instances and *Skidmore* respect in others. As the above suggests, no one is asking for *Chevron* deference with respect to the Secretary's interpretation of § 14501(c)(2)(A). That deference is owed, however, to the agency's interpretation of other provisions of Title 49—interpretations that answer respondents' deregulatory concerns, that demonstrate where this provision falls in the overall statutory scheme and that illustrate a series of reconciliation problems with adopting respondents' interpretation. As for the interpretive letters, one can only admire those who do not find them helpful in deciphering this intricate and interwoven statutory scheme. As the Court recently concluded in addressing an equally-complex statutory scheme—the Medicaid laws—*Skidmore* deference and the "respectful consideration" that comes with it remain appropriate for interpretive letters. *Wis. Dep't of Health & Family Serv. v. Blumer*, 122 S. Ct. 962, 976 (2002).

10. The post-1994 enactments do not alter this interpretation. Also unavailing is respondents' heavy reliance on later laws that Congress enacted in this area—principally the 1995 legislation regarding the authority of States and cities to set the prices of non-consensual tows. *See* 49 U.S.C. § 14501(c)(2)(C). For one, the claimed inference is not a legitimate one. Respondents, recall, do not argue that the 1995 legislation addresses and answers what

"safety regulatory authority of a State" means. They instead try to draw additional inferences from the fact that Congress specified that "political subdivisions" could regulate the prices of their own tows. Instead of modifying § (c)(2)(A) in such an indirect and untimely way, the word choice of the later legislation has more basic explanations. The topic of "prices" is covered specifically in the preemption provision, unlike the "Matters Not Covered" in § (c)(2)(A); it is not a topic that was elsewhere regulated in Title 49 and thus could not have incorporated by reference to those other provisions; and cities at all events are generally the only political bodies that ever will hire towing services. These explanations for mentioning "political subdivisions" by name alone defeat respondents' argument, and they alone suffice to avoid the implication (built upon earlier implications) that Congress in 1995 meant to alter the meaning of § (c)(2)(A).

No less importantly, respondents fail to answer the City's argument (Pet. 25) that later legislation represents a slim reed upon which to rely in construing the handiwork of an earlier legislature. While they say (Resp. 39) that in looking at the context in which a provision appears, the Court has "regularly and correctly applied [this interpretive aid] without regard to when the different components of a statute were first enacted," the three cited cases say no such thing. They thus did not, as respondents request here, decide the meaning of a provision based solely upon inferences drawn from the diction of a later-enacted statute.

Nor, contrary to respondents' suggestion (Resp. 28 n.15), does the fact that the 1995 Act came just one year after the 1994 Act create an exception to this rule. While only one year separated the two laws, that year was hardly an inconsequential one. Not only was a different Congress in power at each time, but the difference between the 103rd Congress and the 104th Congress was the 1994 election, which altered control of the House and by any standard was an important election (even if it did not turn on tow-truck policy).

11. The Airline Deregulation Act (ADA) cases do not help respondents. The two ADA cases upon which respondents rely (Resp. 11-13)—*Morales* and *Wolens*—have little bearing on this case. Because the 1978 ADA, which was addressed in those cases, did not contain any safety exception comparable to § (c)(2)(A), it is difficult to see the relevance of respondents' lengthy discussion of these cases.

The 1978 ADA, however, does offer one insight. That the 1978 ADA contained a preemption provision and did not have a comparable "Matters Not Covered" section (because States and cities had no authority then to regulate airline safety) offers one more explanation why respondents' negative inferences are inappropriate. The drafters of the 1994 FAAA Act were pulling together two strains of legislation with two different pedigrees. At the same time that they borrowed the economic-preemption language from the 1978 ADA, they needed to preserve the safety-authority regulations of the motor-carriers laws. The distinct heritage of each provision goes a long way to explaining the inelegance of the statute and to countering the argument that negative inferences should be drawn from the different provisions.

12. The teachings of *Mortier* remain instructive here. In one respect, the City agrees with respondents' discussion of *Mortier*. Even though the case involved a similar preservation of "State" power, a similar definition of "State" that did not include cities, 501 U.S. at 606, and similar references by name to "political subdivisions," *id.* at 608, respondents are correct that all cases ultimately require a careful dissection of the statutory provisions at issue. But, in this instance, that analysis shows *Mortier* to be the harder case. Unlike this statutory scheme, the state-law-only argument raised in *Mortier* did not present nearly as many implementation and repeal-by-implication problems as the interpretation raised here.

Respondents also attempt to distinguish *Mortier* on the ground (Resp. 21) that "Congress *had not provided* for express preemption or field preemption in FIFRA, and there was no basis for finding implied preemption under the circumstances." But this view ignores the Court's alternative holding. After concluding that Congress did not intend FIFRA to preempt state and local law, the Court observed that, even had preemption been found, local regulation would be precluded only if it could "be shown under ordinary canons of construction that FIFRA's delegation of authority to 'State[s]' would not therefore allow the States in turn to redelegate some of this authority." 501 U.S. at 612. And under "ordinary canons of construction," the Court concluded, FIFRA "can be plausibly read to contemplate precisely such redelegation. The term 'State' is not self-limiting since political subdivisions are merely subordinate components of the whole." *Id.*

Neither does *Mortier* stand as a precedent limited to FIFRA and to it alone. Respondents and their *amici* never dispute these enduring lessons from the case: it is a "well settled" principle that "local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," 501 U.S. at 607-08 (internal citation omitted); "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers," *id.* at 608; and Congress's grant of authority to the "State[s]" left "the allocation of regulatory authority to the 'absolute discretion' of the States themselves," *id.* at 607-08. These lessons are instructive here.

13. The clear-statement rule applies. Far from implicating a contentious debate about the separation of national powers, this case represents a model of cooperative federalism. The United States relies on *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), to explain (U.S. 15-16) that any

power Congress has "to prohibit the delegation of state regulatory authority to municipalities" is "especially anomalous" and accordingly "should not lightly be imputed to Congress." And the City agrees that Congress permissibly gave the DOT authority to review interstate *and* intrastate safety laws enacted by cities and States. Whether one considers the interpretation advanced by respondents to invade the States' sovereignty, as the State *amici* brief does, (Kansas 7-11), or to fall within the outer edges of Congress's power, as the United States does (U.S. 16 n.2), there is little room for doubt that this is not the way Congress usually legislates. It is one thing to preempt a subject of State law; it is quite another to preempt the State governmental process for addressing the subject. That oddity by itself justifies application of *Gregory* and the Court's other clear-statement cases. *See, e.g., United States v. Bass*, 404 U.S. 336 (1971).

Instead of answering this question by pointing to other cases in which the Court has allowed Congress casually to dictate the political methods of state regulation or by pointing to other federal statutes that purport to do the same thing, respondents argue (Resp. 47-50) that several common-law preemption cases intimate that this form of legislation is not unusual. In a few of these cases, respondents note, the Court held that the federal statute preempted state statutes and regulations but not state common-law claims presented to juries, thereby purporting to limit state processes of governing. But all state tort actions ultimately stem from state legislative authorization, whether by laws creating the duty at issue or by laws authorizing the claim in court. *See Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991); *see, e.g.*, Cal. Civ. Code § 22.2 (West 2002); Colo. Rev. Stat. Ann. § 2-4-211 (West 2001); Fla. Stat. Ann. § 2.01 (West 2001); Neb. Rev. Stat. Ann. § 49-101 (Michie 2001). No less importantly, in each of these laws, Congress did not purport to regulate the processes of state government, but rather a category of preempted private activity. *See*

Medtronic, 518 U.S. at 502 (requirements "escape pre-emption, not because the source of the duty is a judge-made common law rule, but rather because their generality leaves them outside the category of requirements that [the statute preempts]"); *Wolens*, 513 U.S. at 228 ("We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airlines alleged breach of its own self-imposed undertakings."). These cases thus all fall on the traditional side of the line, turning on the substance of the regulated area, not on the political bodies given authority there.

Also flawed is the claim (Resp. 49-50) that Congress's greater power to preempt the entire area of interstate transportation includes the lesser power to dictate the state legislative processes for regulating there. For much the same reason that the Court has rejected this theory in the context of unconstitutional conditions, it should reject the theory here. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Congress has no more right to condition a State's regulation of transportation on the promise that it suppress speech in the State than it does to require the State to abandon other constitutional guarantees as a condition of regulating transportation. But the Court need not reach this issue. The construction of the statute offered by the City and United States avoids this perplexing constitutional question, supplying one more reason for embracing their position.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

JANET E. JACKSON
City Attorney
SUSAN E. ASHBROOK
Assistant City Attorney
City of Columbus
90 West Broad Street
Suite 200
Columbus, Ohio 43215

JEFFREY S. SUTTON
(*Counsel of Record*)
TRACI L. LOVITT
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

April 2002

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01-419

In the Supreme Court of the United States

CITY OF COLUMBUS, ET AL., PETITIONERS

v.

OURS GARAGE AND WRECKER SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

KIRK K. VAN TINE
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
PAUL SAMUEL SMITH
Senior Trial Attorney
JUDITH A. RUTLEDGE
Acting Chief Counsel
Federal Motor Safety Carrier Administration
THOMAS T. VINING
Acting Assistant Chief Counsel for General Law
Department of Transportation
Washington, D.C. 20590

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
MARK B. STERN
DANA MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Federal Aviation Administration Authorization Act of 1994 provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1) (Supp. V 1999). The Act further provides, however, that the preemption rule established by Section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). The question presented in this case is as follows:

Whether the "safety regulatory authority of a State" that is preserved by Section 14501(c)(2)(A) encompasses the authority to delegate regulatory power in matters of safety to municipalities within the State's borders.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
By preserving "the safety regulatory authority of a state with respect to motor vehicles," 49 U.S.C. 14501(c)(2)(A) preserves the States' ability to delegate regulatory authority to municipalities	11
A. The text of Section 14501(c)(2)(A) does not preclude municipal safety regulation with respect to motor vehicles	11
B. Other provisions of Title 49 confirm that municipal governments retain the authority to regulate commercial motor carriers with respect to the subject areas specified in Section 14501(c)(2)(A)	16
C. The legislative history of the FAAA Act supports the conclusion that Section 14501(c)(2)(A) preserves the authority of local government to regulate motor vehicle safety pursuant to delegations of state power	22
D. The Department of Transportation has consistently taken the view that local governments retain authority to regulate the safety of tow truck operations	25
E. The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings	28
Conclusion	29

TABLE OF AUTHORITIES

Cases:	Page
Ace Auto Body & Towing, Ltd. v. *City of N.Y.*, 171 F.3d 765 (2d Cir.), cert. denied, 528 U.S. 868 (1999)	25
American Airlines, Inc. v. *Wolens*, 513 U.S. 219 (1995)	2
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	27
Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297 (1983)	13
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	16
Highland Farms Dairy, Inc. v. *Agnew*, 300 U.S. 608 (1937)	16
Hillsborough County v. *Automated Med. Labs., Inc.*, 471 U.S. 707 (1985)	15
Hunter v. *City of Pittsburgh*, 207 U.S. 161 (1907)	12
Lawrence County v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985)	16, 27
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996)	15, 27
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992)	2
Petrey v. *City of Toledo*:	
61 F. Supp.2d 674 (N.D. Ohio 1999)	6
246 F.3d 548 (6th Cir. 2001)	6, 7, 8, 13, 20, 23
R. Mayer of Atlanta, Inc. v. *City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), cert. denied, 526 U.S. 1038 (1999)	6, 8, 23
Reynolds v. *Sims*, 377 U.S. 533 (1964)	12
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)	15
Russello v. *United States*, 464 U.S. 16 (1983)	13, 14
Sailors v. *Board of Educ.*, 387 U.S. 105 (1967)	11

Cases—Continued:	Page
Tocher v. *City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), cert. denied, 531 U.S. 1146 (2001)	16
Wisconsin Pub. Intervenor v. *Mortier*, 501 U.S. 597 (1991)	8, 11, 12, 15
Constitution, statutes and regulations:	
Ohio Const. Art. XVIII, § 3	5
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705	2
§ 4(a), 92 Stat. 1708	2
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569	3
Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136v(a)	12
Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, Tit. II, 98 Stat. 2832	17
ICC Termination Act of 1995, Pub. L. No. 104-88, Tit. I, § 103, 109 Stat. 899 (49 U.S.C. 13101 *et seq.*)	4
49 U.S.C. 14501 (Supp. V 1999)	7, 9, 15, 20
49 U.S.C. 14501(c) (Supp. V 1999)	1, 4, 10, 13, 14, 15, 19, 21
49 U.S.C. 14501(c)(1) (Supp. V 1999)	1, 6, 7, 11, 14, 16, 22, 23, 25
49 U.S.C. 14501(c)(2) (Supp. V 1999)	16
49 U.S.C. 14501(c)(2)(A) (Supp. V 1999)	*passim*
49 U.S.C. 14501(c)(2)(C) (Supp. V 1999)	4
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2154-2157	19
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Tit. IV, 112 Stat. 107:	
§ 4008(a), 112 Stat. 404	20
§ 4008(d), 112 Stat. 404	20
§ 4008(e), 112 Stat. 404	20
18 U.S.C. 1963(a)(1)	14
49 U.S.C. 101(b)(1)	2, 27
49 U.S.C. 101(b)(3)	2, 27

Statutes and regulations—Continued: Page

49 U.S.C. 11501(h) 4
49 U.S.C. 5101-5127 22
49 U.S.C. 5112 21
49 U.S.C. 5112(b) 21
49 U.S.C. 5112(b)(1)(H)(i) 21
49 U.S.C. 5125(d)(1) 21
49 U.S.C. 31101 *et seq.* 19
49 U.S.C. 31102(a) (1994 & Supp. V 1999) 19
49 U.S.C. 31104(h) (Supp. V 1999) 19
49 U.S.C. 31111 (1994 & Supp. V 1999) 21
49 U.S.C. 31114 21
49 U.S.C. 31132(1) (1994 & Supp. V 1999) 20
49 U.S.C. 31132(7) 18
49 U.S.C. 31132(7)-(9) 9, 20, 27
49 U.S.C. 31132(8) 18
49 U.S.C. 31132(9) 18
49 U.S.C. 31136 18
49 U.S.C. 31138 (1994 & Supp. V 1999) 21
49 U.S.C. 31139 (1994 & Supp. V 1999) 21
49 U.S.C. 31141 (1994 & Supp. V 1999) 9, 18, 19, 20, 27
49 U.S.C. 31141(a) 27
49 U.S.C. 31141(b) 20
49 U.S.C. 31141(c)(4) (1994 & Supp. V 1999) 18
49 U.S.C. 31141(c)(4)(C) (1994 & Supp. V 1999) 21
49 U.S.C. 31141(g) (Supp. V 1999) 18, 27
49 U.S.C. 41713(b)(1) 2
Ohio Rev. Code Ann. (Anderson 2000):
§ 715.22(B) 5
§ 723.01 5
§ 4921.02(A)(8) 5
§ 4923.02(A)(10) 5
§ 5501.49 5
City of Columbus, Ohio, Ordinances (2001):
§ 549.02 4
§ 549.065 4
§§ 549.14-549.15 4

Statutes and regulations—Continued: Page

§ 549.17 4
§ 549.20 5
Toledo Mun. Code § 765.02(c) (1997) 7
49 C.F.R.:
Pt. 350 26
Sections 350.335-350.345 19
Pt. 355 26
Section 355.21 19
Section 355.21(a) 26
Pt. 389:
Section 389.31 18
Pt. 397:
Section 397.69(a) 26
Sections 397.201-397.225 22
Section 397.203(a) 21, 26
Section 397.205(a) 26
Miscellaneous:
66 Fed. Reg. (2001):
pp. 29,867-29,876 22
p. 37,260 22
p. 37,264 22
H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. (1995) 2
H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. (1994) 17, 20, 22, 23, 24, 28
Department of Transportation, *Intrastate Trucking Deregulation: An Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305* (Mar. 1995) 25
Department of Transportation, *Memorandum re: Federal Aviation Administration Authorization Act of 1994* (Jan. 1995) 26

In the Supreme Court of the United States

No. 01-419

CITY OF COLUMBUS, ET AL., PETITIONERS

v.

OURS GARAGE AND WRECKER SERVICE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Federal law provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1) (Supp. V 1999). Section 14501(c) further provides, however, that the preemption rule established by Section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). The question presented in this case is whether the "safety regulatory authority of a State" that is preserved by Section 14501(c)(2)(A) encompasses the authority to delegate regulatory power in matters of safety to municipalities within the State's borders.

The Secretary of Transportation is charged with "ensur[ing] the coordinated and effective administration of the transportation programs of the United States Government"

and with "encourag[ing] cooperation of Federal, State, and local governments, carriers, labor, and other interested persons to achieve transportation objectives." 49 U.S.C. 101(b)(1) and (3). The Secretary is authorized, *inter alia*, to determine whether state or municipal laws pertaining to commercial motor vehicle safety may be enforced or will instead be preempted by federal law. The position of the United States is that 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999) preserves the authority of States to delegate safety regulatory power to municipalities, and of municipalities to exercise that delegated power, subject to review by the Secretary under other provisions of law. That interpretation allows municipalities to supplement federal-and state-level regulatory efforts, while ensuring that municipal regulation does not disrupt interstate commerce. The court of appeals' decision, by contrast, substitutes a categorical rule of preemption that divests municipalities of any role in the furtherance of motor carrier safety.

STATEMENT

1. The Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, largely deregulated the domestic airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), the ADA preempted state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708. As amended in the 1994 reenactment of Title 49, the ADA currently provides that "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1); see *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 n.1 (1995) (explaining that "Congress intended the revision to make no substantive change.").

When Congress passed the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), Pub. L. No. 103-305, 108 Stat. 1569, the preemption provision of the ADA served as the model for economic deregulation of the intrastate trucking industry. In its current form, the FAAA Act's preemption provision states in pertinent part as follows:

> (c) Motor carriers of property.—
>
> (1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.—Paragraph (1)—
>
> (A) *shall not restrict the safety regulatory authority of a State with respect to motor vehicles*, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> (B) does not apply to the transportation of household goods; and
>
> (C) does not apply to the authority of a State or a political subdivision of a State to

> enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. 14501(c) (Supp. V 1999) (emphasis added).[1] The dispute in this case centers on the italicized language.

2. Petitioner City of Columbus has enacted various provisions regulating the operation of tow trucks within the City. See Pet. App. 36A-47A. *Inter alia*, those ordinances provide that no owner of a tow truck may permit his tow truck to be used, and no tow truck operator may engage in the towing of a vehicle, "unless a valid tow truck operator's license obtained pursuant to this chapter has been issued and is in force for that tow truck operator." *Id.* at 37A (§ 549.02). The licensing requirement applies only when the towed vehicle is picked up within the City. *Id.* at 37A-38A (§ 549.02). Tow truck operators are forbidden to "respond to the scene of an accident, vehicle breakdown or other disabled vehicle * * * unless either summoned by a person having a direct interest in the vehicle or vehicles involved or dispatched thereto as provided in the rules and regulations promulgated by the Safety Director." *Id.* at 40A (§ 549.065). Tow truck operators within the City are required to maintain specified levels of insurance, see *id.* at 44A-45A (§§ 549.14-549.15), and to comply with recordkeeping requirements concerning the vehicles towed, *id.* at 46A-47A (§ 549.17).

---

[1] Current 49 U.S.C. 14501(c) (Supp. V 1999) was originally codified in substantially similar form at 49 U.S.C. 11501(h). Section 14501(c)(2)(C) was added to the statute in 1995. See ICC Termination Act of 1995, Pub. L. No. 104-88, Tit. I, § 103, 109 Stat. 899; H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 219 (1995).

Administration of petitioner's tow truck ordinances is entrusted to the City's Director of Public Safety, who is authorized to "promulgate a set of rules and regulations to implement [the ordinances] as he deems proper." Pet. App. 47A (§ 549.20). Regulations promulgated by the Director require annual inspections of all tow trucks and specify the equipment that each tow truck must contain. See *id.* at 47A-53A. The regulations also state that "[w]recker operators must display a high proficiency in the operation of their tools and equipment." *Id.* at 48A.

By Constitution and statute, the State of Ohio has delegated to its municipal corporations broad authority to regulate the public streets within their borders. Article XVIII, Section 3 of the Ohio Constitution provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Rev. Code Ann. § 715.22(B) (Anderson 2000) authorizes any municipal corporation to "[l]icense and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon." Section 723.01 states that "[m]unicipal corporations shall have special power to regulate the use of the streets. Except as provided in Section 5501.49 of the Ohio Revised Code Annotated [dealing with lift bridges on state highways within municipal corporations], the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the municipal corporation." And Sections 4921.02(A)(8) and 4923.02(A)(10) specifically exclude persons and businesses "[e]ngaged in the towing of disabled or wrecked vehicles" from the definition of "motor transportation company" and "common carrier by motor

vehicle," thereby exempting tow truck operators from regulation by the Ohio Public Utilities Commission.

3. In December 1998, respondent Ours Garage and Wrecker Service, Inc., filed suit in the United States District Court for the Southern District of Ohio, seeking a declaratory judgment that petitioner's ordinances and administrative regulations governing the operation of tow trucks within the City a[illegible] preempted by 49 U.S.C. 14501(c)(1) (Supp. V 1999). Petitioner and two city officials were named as defendants.

The district court found the challenged municipal-law provisions to be preempted "for the reasons set forth in" *R. Mayer of Atlanta, Inc.* v. *City of Atlanta*, 158 F.3d 538, 545-548 (11th Cir. 1998), cert. denied, 526 U.S. 1038 (1999), and *Petrey* v. *City of Toledo*, 61 F. Supp. 2d 674, 677-680 (N.D. Ohio 1999). Pet. App. 34A. Consistent with those decisions, the district court "conclude[d] that, as a matter of statutory construction, the exceptions to the general rule stated in 49 U.S.C. § [14501(c)(1) (Supp. V 1999)] apply only to states, and not municipalities." *Ibid.*

4. Petitioner appealed to the Court of Appeals for the Sixth Circuit. During the pendency of petitioner's appeal, the court of appeals issued its decision in *Petrey* v. *City of Toledo*, 246 F.3d 548 (6th Cir. 2001) (Pet. App. 4A-32A). *Petrey* involved a preemption challenge, under 49 U.S.C. 14501(c)(1) (Supp. V 1999), to tow truck ordinances enacted by the City of Toledo. See 246 F.3d at 552 (Pet. App. 5A). Based on its decision in *Petrey*, the court of appeals in the instant case affirmed the judgment of the district court. *Id.* at 1A-3A.

a. In its preemption analysis, the court of appeals in *Petrey* distinguished between "non-consensual" and "consensual" tows. With respect to the City's provisions applicable solely to "non-consensual" tows—*i.e.*, tows performed at the direction of the Toledo Police Department without the consent of the vehicle's owner—the court found that the City was acting as a proprietor rather than as a regulator. 246 F.3d at 555-559 (Pet. App. 13A-20A). Because "these provisions do nothing more than serve the City's narrow proprietary interest in working with those towing companies who will be most able to meet safely and efficiently the Toledo Police Department's towing needs," the court concluded, they "do not constitute regulation or have the force and effect of law, and thus are not preempted by 49 U.S.C. § 14501(c)(1)." 246 F.3d at 559 (Pet. App. 19A-20A).

b. The *Petrey* court held, however, that Toledo Municipal Code § 765.02(c) (1997), which requires all tow truck drivers in the City to obtain a special towing license, was preempted by 49 U.S.C. 14501(c)(1) (Supp. V 1999). 246 F.3d at 559-564 (Pet. App. 20A-29A). The court rejected the City's contention that Section 765.02(c) was saved from preemption by 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999), which states that the FAAA Act's preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." The court explained that in its view, "the safety regulation exception to preemption was not meant to apply to a state's political subdivisions." 246 F.3d at 561 (Pet. App. 23A). The court found it significant that the term "political subdivision[s]" appears repeatedly in other portions of 49 U.S.C. 14501 (Supp. V 1999) but "is not mentioned at all in § 14501(c)(2)(A)." 246 F.3d at 561 (Pet. App. 23A). The court concluded that

> when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. Because the term at issue is mentioned so frequently in § 14501, and yet is not mentioned at all in § 14501(c)(2)(A), the use of this presumption seems particularly appropriate in this case. Applying this pre-

sumption in this case, we hold that, while states may regulate the safety of motor carriers, political subdivisions may not.

Ibid. (Pet. App. 23A-24A) (citations and internal quotation marks omitted).

The *Petrey* court found support for its interpretation of 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999) in the legislative history and purpose of the FAAA Act's preemption provision. 246 F.3d at 563-564 (Pet. App. 28A-29A). Relying on the Conference Report accompanying the Act, the court observed that "one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations." *Id.* at 563 (Pet. App. 28A). In the court's view, that legislative history "indicat[ed] that yet another level of regulation at the local level would be disfavored." *Ibid.* The *Petrey* court therefore agreed with the Eleventh Circuit that "it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Ibid.* (quoting *R. Mayer of Atlanta*, 158 F.3d at 546).

c. In the court of appeals, petitioner "concede[d] that *Petrey* control[led] the disposition of this case. Accordingly, [the court of appeals] affirm[ed] the judgment of the district court permanently enjoining the City's enforcement of these towing provisions." Pet. App. 2A.

SUMMARY OF ARGUMENT

A. A State generally possesses "absolute discretion," *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 608 (1991), to delegate as much or as little authority as it chooses to its political subdivisions. Congress's express declaration that States retain their existing authority with respect to

specified aspects of motor carrier operations, including "safety," is therefore best understood to preserve the State's traditional power *either* to regulate those matters at the state level *or* to delegate that authority to local governments. The fact that other provisions of Section 14501 refer specifically to "political subdivision[s]," while Section 14501(c)(2)(A) does not, is an insufficient basis for departing from that established understanding of the scope of a State's regulatory authority. Construing Section 14501(c)(2)(A) to preserve a municipality's regulatory authority over the subject matters (including "safety") enumerated therein is consistent with the presumption against preemption of state and local law. The regime contemplated by the court of appeals, in which States would be effectively precluded from delegating their own regulatory powers to municipal governments, is especially anomalous because it would intrude upon the traditional authority of a State to allocate power among its various subordinate units in the manner it sees fit.

B. Other provisions of Title 49 confirm that municipal governments retain the authority to regulate commercial motor carriers with respect to "safety" and the other matters specified in Section 14501(c)(2)(A). Under 49 U.S.C. 31141 (1994 & Supp. V 1999), the Secretary is authorized to conduct review proceedings to determine whether particular state safety laws and regulations governing interstate motor carrier operations may be enforced or will instead be preempted. For purposes of those review proceedings, the terms "State," "State law," and "State regulation" are defined to include "political subdivision[s]" and any law or regulation enacted or prescribed by a "political subdivision." 49 U.S.C. 31132(7)-(9). Thus, the statutory scheme expressly contemplates regulatory proceedings in which the Secretary of Transportation may review municipal ordinances and regulations pertaining to the safety of interstate commercial motor carrier operations. In addition, the Secretary's

administration of the Motor Carrier Safety Assistance Program involves review of state and local motor carrier safety laws pertaining to intrastate as well as interstate operations.

The continued existence of those statutory provisions substantially undermines respondent's contention that local governments are categorically foreclosed from regulating commercial motor carrier safety. The possibility of review by the Secretary also provides a mechanism for ensuring that municipal safety regulation does not unreasonably burden interstate commerce. Other provisions of Title 49 similarly address the remaining subject areas (*e.g.*, highway routing controls for hazardous materials) identified in Section 14501(c)(2)(A). It is to those provisions, rather than to Section 14501(c), that courts should look to determine the permissible scope of municipal regulation in the enumerated areas.

C. The pertinent legislative history supports the conclusion that municipal governments retain authority to regulate motor carrier safety pursuant to delegations of state power. The Conference Report accompanying the FAAA Act reflects Congress's intent to distinguish between preempted and non-preempted regulation on the basis of subject matter—*i.e.*, by preempting economic regulation while leaving other categories (including "safety") of regulation intact—rather than to distinguish between state- and municipal-level regulation.

D. The Department of Transportation has consistently taken the view that local governments retain authority to regulate the safety of tow truck operations. The agency has stated that position in memoranda, prepared and circulated shortly after the FAAA Act's passage, that specifically addressed the Act's preemptive scope. That position is also reflected in the Department's regulations implementing the

MCSAP, and it is entitled to deference from a reviewing court.

ARGUMENT

BY PRESERVING "THE SAFETY REGULATORY AUTHORITY OF A STATE WITH RESPECT TO MOTOR VEHICLES," 49 U.S.C. 14501(C)(2)(A) PRESERVES THE STATES' ABILITY TO DELEGATE REGULATORY AUTHORITY TO MUNICIPALITIES

A. The Text Of Section 14501(c)(2)(A) Does Not Preclude Municipal Safety Regulation With Respect To Motor Vehicles

1. The preemption provision of the FAAA Act states as a "[g]eneral rule" that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1) (Supp. V 1999). The Act further provides, however, that the general rule of preemption "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). The question presented in this case is whether a municipal government, acting pursuant to express constitutional and statutory delegations of authority from the State, is permitted to enact and enforce safety regulations pertaining to the carriage of goods by motor vehicle.

"The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607-608 (1991) (ellipsis, brackets, and internal quotation marks omitted). Accord, *e.g.*, *Sailors* v. *Board of Educ.*, 387 U.S. 105, 107-108 (1967) ("Political subdivisions of States * * * have been traditionally

regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.") (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964)); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). In *Mortier*, the Court applied that principle in construing 7 U.S.C. 136v(a), a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Section 136v(a) provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 501 U.S. at 606. The Court in *Mortier* rejected the contention that Section 136v(a)'s express authorization of regulation by "[a] State" impliedly precluded regulation of pesticides by local governmental units. The Court explained:

> The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" because political subdivisions are components of the very entity the statute empowers. Indeed, *the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the "absolute discretion" of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.*

Id. at 608 (emphasis added).

The same analysis applies in this case. Congress declared that States retain their existing "safety regulatory authority," as well as their existing "authority" with respect to other specified aspects of motor carrier operations, including "highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo," and "minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). Congress's declaration that the "authority of a State" in those specified

areas remains unaffected is best understood to preserve the State's traditional power *either* to regulate the pertinent subject matter at the state level *or* to delegate that authority to local governments. Indeed, that inference is stronger here than in *Mortier* itself. Because the FAAA Act was enacted approximately three years after the decision in *Mortier*, it is particularly appropriate to read the phrase "authority of a State" to encompass the States' traditional prerogative of conferring on local governments all powers that might have been exercised at the state level. Cf. *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 319, 320 (1983) (holding that because Congress is presumed to be familiar with existing law, the statutory phrase "employees traditionally covered" should be construed "to refer to those employees included in the scope of coverage under" this Court's prior decisions).

2. In adopting a contrary reading of 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999), the court of appeals in *Petrey* noted that the term "political subdivision" is used repeatedly in other parts of Section 14501(c). 246 F.3d at 561 (Pet. App. 23A). Relying on the interpretive canon that "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" *ibid.* (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)), the court inferred from the omission of the term from Section 14501(c)(2)(A) that "Congress did not intend to exempt political subdivisions from preemption when they attempt to engage in safety regulation," *id.* at 26A. That reasoning is unpersuasive.

a. This Court in *Russello* did not invoke the interpretive canon described above as a basis for departing from the literal import of the statutory text. The question presented in *Russello* was "whether profits and proceeds derived from

racketeering constitute an 'interest' within the meaning of [18 U.S.C. 1963(a)(1)] and are therefore subject to forfeiture." 464 U.S. at 20. The petitioner "contend[ed] that § 1963(a)(1) reaches only 'interests in an enterprise' and does not authorize the forfeiture of mere 'profits and proceeds.'" *Ibid.* This Court first surveyed various dictionary definitions and found it "apparent that the term 'interest' comprehends all forms of real and personal property, including profits and proceeds." *Id.* at 21. Only after concluding that the term "interest" was most naturally understood to encompass profits and proceeds (*id.* at 21-22) did the Court state that it was "fortified in this conclusion by * * * the structure of the RICO statute" (*id.* at 22), including references in other statutory subsections to particular categories of "interest[s]" (*id.* at 22-23). Thus, in *Russello* itself, the thrust of the analysis was that a court should be particularly reluctant to infer a limitation on facially unqualified statutory language if an analogous limitation is expressly stated in a different provision of the statute.

In *Petrey*, by contrast, the court of appeals invoked the *Russello* canon not to buttress the natural reading of Section 14501(c)(2)(A), but to support a construction that is at odds with the statutory language. Section 14501(c)(2)(A) states categorically that the general preemption rule of Section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." As interpreted by the *Petrey* court, however, Section 14501(c)(1) *would* "restrict" the States' "safety regulatory authority" in this area by precluding a State from exercising its traditional discretion to delegate its regulatory powers to local governmental units.

b. Other interpretive canons support the view that "the safety regulatory authority of a State" that is preserved by 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999) includes the authority to delegate regulatory power to units of local government. Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); accord, *e.g.*, *Mortier*, 501 U.S. at 605. That presumption is fully applicable to cases in which federal law is claimed to preempt a municipal ordinance. See *ibid.* ("It is * * * axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'") (quoting *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). The presumption is especially compelling in the present context, since "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County*, 471 U.S. at 719.

The language of 49 U.S.C. 14501(c) (Supp. V 1999) does not reflect a "clear and manifest" congressional intent to preempt municipal safety regulation with respect to commercial motor carriers. To the contrary, Section 14501(c)(2)(A) is most naturally read to preserve a municipality's traditional authority to protect the public safety within its borders pursuant to an express delegation of power from the State. The natural import of Section 14501(c)(2)(A)'s language, buttressed by the presumption against preemption of state and municipal law, overcomes any negative implication that might be created by the express references to "political subdivision[s]" in other portions of Section 14501.

The regime contemplated by the court of appeals, in which commercial motor carriers are subject to state-level safety regulation but not to substantively identical requirements adopted by municipalities, is especially anomalous because it would intrude upon the traditional authority of a State to allocate power among its various governmental units in the

manner it sees fit. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937); cf. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."). As with the establishment of federal qualifications for state officers, Congress's power to prohibit the delegation of state regulatory authority to municipalities "is a power that [the Court] must assume Congress does not exercise lightly." *Ibid.*[2]

B. Other Provisions Of Title 49 Confirm That Municipal Governments Retain The Authority To Regulate Commercial Motor Carriers With Respect To The Subject Areas Specified in Section 14501(c)(2)(A)

Section 14501(c)(2), it should be emphasized, does not say that state regulation within the specified areas is not preempted. Rather, it says that *"Paragraph (1)"—i.e.*, 49 U.S.C. 14501(c)(1) (Supp. V 1999)—"shall not restrict the * * * authority of a State" with respect to the enumerated

[2] In construing Section 14501(c)(2)(A) not to authorize municipal safety regulation, the Ninth Circuit stated that "a contrary reading of the safety exception would lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1051 (9th Cir. 2000), cert. denied, 531 U.S. 1146 (2001). That analysis is misconceived. Congress possesses *power* to preempt municipal regulation without preempting state-level regulation, just as it possesses power to preempt other state-law provisions governing the relationship between the State and its localities. Cf. *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260-270 (1985) (statute providing federal funds to local governments in lieu of payment of local taxes on federally owned property held to preempt state-law restrictions on the manner in which localities could spend the money). Exercise of that authority is sufficiently unusual, however, that such an intent should not lightly be imputed to Congress.

subject matters. Accordingly, to construe the phrase "authority of a State" in Section 14501(c)(2)(A) to encompass delegations of power to municipal governments would not leave municipal regulation in the defined areas unconstrained by federal law. It simply means that the propriety of municipal regulation regarding those matters is to be determined by reference to other federal statutory provisions that specifically address preemption in the pertinent subject areas. That reading is confirmed by the legislative history. The Conference Report accompanying the FAAA Act emphasized that nothing in Section 14501(c)(2)(A) "amends other Federal statutes that govern the ability of States to impose safety requirements" or to regulate the other subject matters identified in that Section. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 84 (1994); see *ibid.* (FAAA Act leaves state authority in those areas "unaffected"); *id.* at 85 (state authority "unchanged").[3]

1. Issues of motor carrier safety, including standards for preemption, are addressed elsewhere in federal law. The Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, Tit. II, 98 Stat. 2832, required the Secretary to issue or reissue

[3] The Conference Report noted the "concern" that Section 14501(c)(2)(A) "may be construed as granting States additional authority to regulate in those enumerated areas [including safety] rather than simply stressing that the preemption provisions do not apply to those areas." H.R. Conf. Rep. No. 677, *supra*, at 84. The Conference Report then "emphasize[d] that nothing in [Section 14501(c)(2)(A)] contains a new grant of Federal authority to a State to regulate commerce and nothing in [that Section] amends other Federal statutes that govern the ability of States to impose safety requirements, hazardous materials routing matters, truck size and weight restrictions or financial responsibility requirements." *Ibid.* The Conference Report thus reflects Congress's awareness that state regulation of motor carriers with respect to the matters described in Section 14501(c)(2)(A) was subject to pre-existing federal statutory limitations, and its intent that those limitations would remain unchanged.

regulations pertaining to commercial motor vehicle safety, and it established a mechanism by which the agency may determine whether state and local safety regulations governing interstate motor carrier operations are preempted. Regulations adopted by the Secretary with regard to commercial motor vehicle safety are "minimum" safety standards. 49 U.S.C. 31136 (1994 & Supp. V 1999). States remain free to adopt their own regulations on commercial motor vehicle safety, subject to review and possible preemption by the Secretary. 49 U.S.C. 31141 (1994 & Supp. V 1999). "If the Secretary decides a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary" under Section 31136, that "State law or regulation" may not be enforced if the Secretary determines that "the State law or regulation has no safety benefit"; "the State law or regulation is incompatible with the regulation prescribed by the Secretary"; or "enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141(c)(4) (1994 & Supp. V 1999). "To review a State law or regulation on commercial motor vehicle safety under this section, the Secretary may initiate a regulatory proceeding on the Secretary's own initiative or on petition of an interested person (including a State)." 49 U.S.C. 31141(g) (Supp. V 1999); see 49 C.F.R. 389.31.

For purposes of Section 31141, the term "State" is defined to include "a political subdivision of a State." 49 U.S.C. 31132(7). The terms "State law" and "State regulation" are likewise defined to include a law or regulation enacted or prescribed "by a political subdivision of a State." 49 U.S.C. 31132(8) and (9). Thus, the statutory scheme expressly contemplates regulatory proceedings in which the Secretary of Transportation may review municipal ordinances and regulations pertaining to the safety of interstate commercial

motor carrier operations and then determine whether those provisions may be enforced.

Additional federal review of state and local motor carrier safety standards occurs under the Motor Carrier Safety Assistance Program (MCSAP or Program), which was first authorized by the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2154-2157. The statutory provisions governing the MCSAP are presently codified at 49 U.S.C. 31101 *et seq.* Under that Program, the Secretary of Transportation is authorized to "make grants to States for the development or implementation of programs for the enforcement of regulations, standards, and orders of the United States Government on commercial motor vehicle safety and compatible State regulations, standards, and orders." 49 U.S.C. 31102(a) (1994 & Supp. V 1999). In implementing the MCSAP, "[t]he Secretary shall prescribe regulations specifying tolerance guidelines and standards for ensuring compatibility of intrastate commercial motor vehicle safety laws and regulations with [federal] motor carrier safety regulations." 49 U.S.C. 31104(h) (Supp. V 1999). The Secretary's administration of the grant Program thus involves scrutiny of state and local motor carrier safety laws pertaining to intrastate as well as interstate operations. See 49 C.F.R. 350.335-350.345, 355.21.

Those statutory frameworks for the review of state and municipal laws were not altered by the FAAA Act, and they are therefore significant in two related respects. First, the continued existence of express statutory authority for the Secretary of Transportation to review municipal laws pertaining to commercial motor carrier safety substantially undermines respondent's contention that such laws are categorically preempted by 49 U.S.C. 14501(c) (Supp. V 1999). Section 31141's express provision for review of municipal safety regulation should not be deemed superflu-

ous absent very clear evidence that such was Congress's intent.

Far from precluding municipal regulation of motor carrier safety, the FAAA Act explicitly *preserved* the "safety regulatory authority of a State with respect to motor vehicles" (49 U.S.C. 14501(c)(2)(A) (Supp. V 1999))—a phrase that is naturally understood to encompass the State's traditional discretion to delegate regulatory power to local governmental units. See pp. 11-13, *supra*. The court of appeals' textual justification for finding blanket preemption of municipal safety regulation was based on negative inferences drawn from references to "political subdivision[s]" in other parts of Section 14501. It is implausible to suppose, however, that Congress would have impliedly superseded the existing statutory review framework in so oblique a fashion, and the legislative history shows that Congress did not intend to do so. See H.R. Conf. Rep. No. 677, *supra*, at 84 (nothing in Section 14501(c)(2)(A) "amends other Federal statutes that govern the ability of States to impose safety requirements"); p. 17 & n. 3, *supra*.[4]

Second, the availability of review by the Secretary under Section 31141 and under the MCSAP belies the *Petrey* court's conclusion, see 246 F.3d at 563 (Pet. App. 28A), that preemption of *all* municipal motor carrier safety regulation is necessary to prevent disruption of interstate commerce. Section 31141 expressly contemplates the review of safety

[4] In 1998, Congress amended Section 31141 to eliminate the prior provisions (see 49 U.S.C. 31141(b)) for review of state safety laws by the Commercial Motor Vehicle Safety Regulatory Review Panel and to modify the procedures for review by the Secretary. See Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Tit. IV, § 4008(d) & (e), 112 Stat. 404. The same 1998 legislation amended the definition of "commercial motor vehicle" contained in Section 31132(1). See § 4008(a), 112 Stat. 404. Congress did not, however, delete or alter the references to "political subdivision[s]" contained in the existing definitions (see 49 U.S.C. 31132(7)-(9)) of "State," "State law," and "State regulation."

measures adopted by political subdivisions to determine, *inter alia*, whether enforcement of such measures "would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141(c)(4)(C) (1994 & Supp. V 1999). As a condition of assistance under the MCSAP, States must ensure that their own safety regulations and those of their political subdivisions are "compatible" with federal standards. The Title 49 provisions that specifically address motor carrier safety allow municipalities to supplement federal and state-level efforts to enhance motor carrier safety, while preventing enforcement of municipal laws that have unacceptable economic effects.

2. Congress has also specifically addressed the other subjects identified in 49 U.S.C. 14501(c)(2)(A) (Supp. V 1999). See 49 U.S.C. 5112 (highway routing of hazardous materials); 49 U.S.C. 31111 (1994 & Supp. V 1999) (motor vehicle length and width limitations); 49 U.S.C. 31114 (commercial motor vehicle access to interstate and federal aid highways); 49 U.S.C. 31138 & 31139 (1994 & Supp. V 1999) (minimum motor carrier financial responsibility). It is to those statutory provisions, not to Section 14501(c), that courts should look to determine the permissible scope of municipal regulatory authority with respect to the enumerated subject areas.

Section 5112, for example, clearly presupposes that local governments have a role (subject to standards prescribed by the Secretary under Section 5112(b)) in the establishment of highway route controls for hazardous materials. See 49 U.S.C. 5112(b)(1)(H)(i) (State is responsible "for ensuring that political subdivisions of the State comply with standards prescribed under this subsection"). Under 49 U.S.C. 5125(d)(1), the Secretary is authorized to determine whether a hazardous materials transportation "requirement of a State, political subdivision, or tribe * * * is preempted." See 49 C.F.R. 397.203(a) (standards for determining whether

a "highway routing designation established, maintained, or enforced by a State, political subdivision thereof, or Indian tribe is preempted"); 49 C.F.R. 397.201-397.225 (procedures for resolving preemption questions); 66 Fed. Reg. 37,260, 37,264 (2001) (reviewing, and holding to be preempted, Morrisville, Pennsylvania highway routing designation for hazardous waste); *id.* at 29,867-29,876 (reviewing restrictions on the transportation of explosives imposed by Cleveland, Ohio, and concluding that some but not others are preempted). As with the provisions for review of municipal laws governing safety, Section 14501(c)(2)(A) does not impliedly supersede that carefully crafted scheme. See H.R. Conf. Rep. No. 677, *supra*, at 84 (explaining that if a State exercises authority over the routing of hazardous materials by motor carrier, it must do so in a manner consistent with 49 U.S.C. 5101-5127, and that "[t]he intention of the conferees is solely to identify certain areas that are not preempted by the preemption provision" in Section 14501(c)(1)).

C. The Legislative History Of The FAAA Act Supports The Conclusion That Section 14501(c)(2)(A) Preserves The Authority Of Local Governments To Regulate Motor Vehicle Safety Pursuant To Delegations Of State Power

In *Petrey*, the court of appeals relied in part on the following passage from the Conference Report accompanying the FAAA Act:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets * * *. The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 677, *supra*, at 87 (quoted in *Petrey*, 246 F.3d at 563 (Pet. App. 28A)). From Congress's "inten[t] to encourage market forces * * * through the elimination of a myriad of complicated and potentially conflicting state regulations," the court inferred "that yet another level of regulation at the local level would be disfavored." 246 F.3d at 563 (Pet. App. 28A). The court agreed with the Eleventh Circuit that in drafting Section 14501(c)(2)(A), "Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Ibid.* (quoting *R. Mayer of Atlanta*, 158 F.3d at 546). That analysis is misconceived.

In describing the type of regulation that had been found to burden interstate commerce, the Conference Report referred specifically to "*[s]tate economic regulation* of motor carrier operations." H.R. Conf. Rep. No. 677, *supra*, at 87 (emphasis added). The italicized language is significant in two respects. First, that language is clearly intended to describe the category of regulation that is subject to the general rule of preemption established by Section 14501(c)(1). Because the general rule established by Section 14501(c)(1) is expressly made applicable both to "State[s]" and to "political subdivision[s]," the Conference Report's reference to "state economic regulation" necessarily encompasses municipal ordinances. The Conference Committee's use of the term "state economic regulation" in that manner undermines the court of appeals' conclusion that Congress intended the phrase "authority of a State" in Section 14501(c)(2)(A) to *exclude* the exercise by municipalities of delegated regulatory power. See also H.R. Conf. Rep. No. 677, *supra*, at 85 (stating that Section 14501(c)(1) "preempts

State regulation of prices, routes and services of motor carriers").

Second, the Conference Report referred to the deleterious effects not of state motor carrier regulation generally, but of "state *economic* regulation." Congress's decision to preserve state regulatory authority with respect to the subject matters (such as "safety") specified in Section 14501(c)(2)(A) is no less central to the statutory scheme than its determination that economic regulation should be preempted. There is consequently no reason to construe the phrase "authority of a State" to deprive a State of its customary discretion to delegate whatever regulatory power the State itself possesses to municipalities within its borders.[5]

---

[5] The Conference Report explained that

> [t]he conferees do not intend the regulatory authority which the States may continue to exercise * * * to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through [their] unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

H.R. Conf. Rep. No. 677, *supra*, at 84. The Conference Committee thus recognized the danger that the reserved authority of States to regulate some aspects of motor carrier operations might be exercised in a way that would burden commerce and thus disserve the purposes of the Act. The Committee addressed that danger, however, by emphasizing the distinction between those *subject areas* that did and those that did not remain subject to state regulatory authority—not by distinguishing between state- and municipal-level regulation.

D. The Department Of Transportation Has Consistently Taken The View That Local Governments Retain Authority To Regulate The Safety Of Tow Truck Operations

1. A March 1995 Department of Transportation memorandum specifically addressing the FAAA Act's preemptive scope explained that, while "[t]ow truck operators are considered to be motor carriers of property" under Title 49, "State actions that are legitimately grounded in public safety considerations are exempt from [FAAA Act preemption]. For example, we believe that State or local regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption, assuming * * * that such regulations are not a guise for broader economic restrictions." *Intrastate Trucking Deregulation: An Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305* at 2. In *Ace Auto Body & Towing, Ltd.* v. *City of New York*, 171 F.3d 765 (2d Cir.), cert. denied, 528 U.S. 868 (1999), the Second Circuit relied in part on that agency memorandum in holding that municipal laws regulating tow truck safety are not preempted by Section 14501(c)(1). See *id.* at 775-776.

Another, contemporaneous Department of Transportation memorandum, developed in consultation with the Interstate Commerce Commission and used to furnish guidance to public officials and others, explained:

> The [FAAA] Act does not attempt to completely deregulate the motor carrier industry. In fact, the new law specifically reserves the States' (*and local governments[']* *to the extent that they derive power from the States*) authority to regulate with respect to safety, financial responsibility and other non-economic matters. Therefore, State and local bodies may be able to control tow truck operators and other motor carriers subject to

the FAAA Act as a matter of public safety or as an exercise of their police powers.

Memorandum re: Federal Aviation Administration Authorization Act of 1994 at 2 (Jan. 1995) (emphasis added). Those memoranda reflect the agency's consistent view, first articulated a few months after the FAAA Act's enactment, that States retain their traditional discretion to delegate to municipal governments those powers reserved by Section 14501(c)(2)(A).

2. The same view is reflected in regulations governing the Secretary's implementation of the MCSAP. See 49 C.F.R. Pts. 350 and 355. Those regulations provide that, to facilitate the Secretary's administration of the Program, "[e]ach State shall annually analyze its laws and regulations, *including those of its political subdivisions*, which pertain to commercial motor vehicle safety to determine whether its laws and regulations are compatible with the Federal Motor Carrier Safety Regulations." 49 C.F.R. 355.21(a) (emphasis added). The Secretary's regulations thus presume that municipal governments retain the authority to enact laws governing commercial motor vehicle safety.[6]

---

[6] The agency regulations governing transportation of hazardous materials (see pp. 21-22, *supra*) likewise presume that municipal governments retain regulatory authority in that area. See, *e.g.*, 49 C.F.R. 397.69(a) (for purposes of specified regulatory provisions, "any highway routing designation affecting the highway transportation of NRHM [non-radioactive hazardous material], made by a political subdivision of a State is considered as one made by that State"); 49 C.F.R. 397.203(a) (standards for determining whether a "highway routing designation established, maintained, or enforced by a State, political subdivision thereof, or Indian tribe is preempted"); 49 C.F.R. 397.205(a) ("Any person * * * directly affected by any highway routing designation of another State, political subdivision, or Indian tribe, may apply to the [Federal Motor Carrier Safety] Administrator for a determination of whether that highway routing designation is preempted.").

The Secretary's determination is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the FAAA Act itself does not confer rulemaking authority on the Secretary of Transportation, the Secretary is charged generally with "ensur[ing] the coordinated and effective administration of the transportation programs of the United States Government" and with "encourag[ing] cooperation of Federal, State, and local governments, carriers, labor, and other interested persons to achieve transportation objectives." 49 U.S.C. 101(b)(1) and (3). Moreover, the Motor Carrier Safety Act of 1984 provides that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced," 49 U.S.C. 31141(a), and it authorizes the Secretary to conduct "regulatory proceeding[s]" to determine whether a "State law or regulation on commercial motor vehicle safety" may be enforced, 49 U.S.C. 31141(g) (Supp. V 1999). For purposes of those provisions, the terms "State," "State law," and "State regulation" are defined to include "a political subdivision of a State" and any law or regulation enacted or prescribed by a political subdivision. 49 U.S.C. 31132(7)-(9); see pp. 18-19, *supra*.

In determining whether municipal motor carrier safety regulations may be enforced, the Secretary must necessarily consider not only the terms of 49 U.S.C. 31141 (1994 & Supp. V 1999) itself, but also whether such regulations are precluded by some other provision of federal law. Because the Secretary's assessment of the FAAA Act's preemptive scope is integrally related to the performance of his responsibilities under Section 31141, it is entitled to judicial deference. See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 493-494 (1996); cf. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 261-262 (1985).

E. The Judgment Of The Court Of Appeals Should Be Reversed, And The Case Should Be Remanded For Further Proceedings

Because the courts below found Section 14501(c)(2)(A) to be inapplicable to safety measures adopted at the local level, they held the challenged ordinances and regulations to be preempted. For the reasons stated above, that holding was erroneous. The judgment of the court of appeals should therefore be reversed.

That disposition would not necessarily mean that all aspects of the challenged municipal provisions would ultimately escape preemption. Although the phrase "safety regulatory authority of a State" encompasses municipal safety regulations adopted pursuant to a delegation of power from the State, the City's mere *assertion* of a safety purpose does not by itself resolve the preemption question. See H.R. Conf. Rep. No. 677, *supra*, at 84 ("The conferees do not intend the regulatory authority which the States may continue to exercise [under Section 14501(c)(2)(A)] to be used as a guise for continued economic regulation as it relates to prices, routes or services."); note 5, *supra*. Because the courts below construed Section 14501(c)(2)(A) as inapplicable to municipal ordinances and regulations, they did not determine whether the provisions at issue in this case are appropriately regarded as exercises of "safety regulatory authority." That question may be open to the court of appeals on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

KIRK K. VAN TINE
General Counsel

ROBERT D. MCCALLLUM, JR.
Assistant Attorney General

PAUL M. GEIER
Assistant General Counsel for Litigation

EDWIN S. KNEEDLER
Deputy Solicitor General

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation

MALCOLM L. STEWART
Assistant to the Solicitor General

PAUL SAMUEL SMITH
Senior Trial Attorney

MARK B. STERN
DANA MARTIN
Attorneys

JUDITH A. RUTLEDGE
Acting Chief Counsel
Federal Motor Safety Carrier Administration

THOMAS T. VINING
Acting Assistant Chief Counsel for General Law
Department of Transportation

FEBRUARY 2002

Supreme Court, U.S.
FILED
FEB 19 2002

(13)

No. 01-419

In The

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF AMICUS CURIAE MIAMI-DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA IN SUPPORT OF PETITIONER CITY OF COLUMBUS

LEONARD LEIGH ELIAS, ESQUIRE
Counsel of Record
MIAMI-DADE CONSUMER ADVOCATE
On behalf of:
Miami-Dade County, Florida
140 West Flagler Street, Suite 903
Miami, FL 33130
Phone No. (305) 375-4199
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF CONSENT	1
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
A. Congress lacks the power to preempt local governments from licensing and regulating towing activities	5
B. Congress did not expressly and manifestly intend to preempt local governments from licensing and regulating towing activities	10
C. The Interstate Commerce Act does not prevent states from delegating enforcement powers to local governments relating to towing activities	14
D. Licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

426 Bloomfield Avenue Corp. v. City of Newark, 904 F. Supp. 364 (D. N.J. 1995) 5, 6

Ace Auto Body & Towing, LTD. v. City of New York, 171 F.3d 765 (2d Cir. 1999) 14

Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942) 10

Bioganic Safety Brands, Inc. v. Ament, 174 F.Supp.2d 1168 (D. Colo. 2001) 12

California v. Zook, 336 U.S. 725 (1949) 10

Caraker v. Sandoz Pharmaceuticals Corp., 2001 WL 1190858 (S.D. Ill. 2001) 12, 13

Casino Ventures v. Stewart, 183 F.3d 307 (C.A.4 S.C. 1999) 13

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 10

Crane Towing, Inc. v. Gorton, 89 Wash.2d 161 (1977) 13

Federal Express Corp. v. California Public Util. Comm'n, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992) 6

Geier v. American Honda Motor Co., Inc., 166 F.3d 1236 (C. A.D.C. 1999) 13

In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, 153 F.Supp.2d 935 (S.D. Ind.Indianapolis.Div. 2001) 12

Kemp v. Medtronic, Inc., 231 F.3d 216 (C.A.6 Ohio 2000) 12

Law v. General Motors Corp., 114 F.3d 908 (C.A.9 Cal. 1997) 13

TABLE OF AUTHORITIES – Continued

Page

Lindsey v. Tacoma-Pierce County Health Dept., 8 F.Supp.2d 1213 (W.D. Wash. 1997) 13

Lorincie v. Southeastern Penn. Transp. Authority, 34 F.Supp.2d 929 (E.D. Pa. 1998) 13

Maine v. Taylor, 477 U.S. 131 (1986) 8, 9

Oxygenated Fuels Ass'n, Inc. v. Pataki, 158 F.Supp.2d 248 (N.D. N.Y. 2001) 12

People of State of California v. Thompson, 313 U.S. 109 (1941) 9

People v. Servantes, 86 Cal.App.4th 1081 (C.A.5 Cal. 2001) 14

Poole v. Burlington Northern R. Co., 987 F.Supp. 753 (D. Neb. 1997) 13

R. Mayer of Atlanta v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) 7

Railway Exp. Agency v. People of State of N.Y., 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949) 7

Rhode Island Public Towing Ass'n v. State of Rhode Island, 1997 U.S. Dist. LEXIS 3316 (D. R.I. 1977) ..6, 11

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 10

Russello v. United States, 464 U.S. 16 (1983) 15

Somes v. United Airlines, Inc., 33 F.Supp.2d 78 (D. Mass. 1999) 13

United States v. Lopez, 514 U.S. 549 (1995), 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995) 8

TABLE OF AUTHORITIES – Continued

Page

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991) 14

Wright v. Brooke Group Ltd., 114 F.Supp.2d 797 (N.D. Iowa 2000) 12

STATUTES

49 U.S.C. § 11501(b)(2)(A) 14

49 U.S.C. § 13101 12

49 U.S.C. § 13506(b) 11

49 U.S.C. § 13506(b)(3) 12

49 U.S.C. § 14501(c) 10

49 U.S.C. § 14501(c)(1) 6

49 U.S.C. § 14501(c)(2)(A) 14, 15, 16

Florida Statute, § 715.07(9)(b) 15

Section 11, Article VIII, 1885, of the Florida Constitution 1

Section 2-25.2(a) and (b) of the Code of Miami-Dade County, Florida 2

Section 2-25.3 of the Code of Miami-Dade County, Florida 2

Section 30 of the Code of Miami-Dade County, Florida 1

Section 30-477 of the Code of Miami-Dade County, Florida 1

Title VI in the Interstate Commerce Commission Termination Act of 1995 6

Title VI of the Federal Aviation Administration Authorization Act of 1994 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Conf. Rep. on H.R. 2739, 140 Cong. Rec. H 7116 6

STATEMENT OF CONSENT

Pursuant to Rule 37.4 of the Rules of this Court, this amicus brief is submitted on behalf of Miami-Dade County, a political subdivision of the State of Florida, and thus no motion for leave to file an *amicus curiae* brief is necessary.

INTEREST OF AMICUS CURIAE[1]

Miami-Dade County is a political subdivision of the State of Florida. Section 11, Article VIII, 1885, of the Florida Constitution vests Miami-Dade County with the power of the Florida Legislature in matters of local concern. On July 11, 1989, the Miami-Dade Board of County Commissioners enacted Article III, Section 30 of the Code of Miami-Dade County, Florida, relating to towing of motor vehicles. This comprehensive ordinance was designed to regulate the towing industry at large, to address towing safety issues and to prohibit abusive practices committed by various towing companies. Pursuant to Section 30-477 of the Code of Miami-Dade County, Florida, the towing of Motor Vehicles Ordinance is enforced by the Miami-Dade Consumer Services Department, the police forces of the various municipalities in Miami-Dade County, and the Miami-Dade Police Department. The Miami-Dade Consumer Services

[1] This brief was authored solely by the Miami-Dade Consumer Advocate, and not authored at all by counsel for a party. The entire expense of printing and serving the brief is to be paid by Miami-Dade County, a political subdivision of the State of Florida.

Department licenses all towing companies that regularly perform towing services within the confines of Miami-Dade County, Florida.

If the Sixth Circuit decision is upheld by this Court, Miami-Dade County, Florida, and all other local governments in the nation, will be precluded from protecting their citizens from the pitfalls endemic to the towing industry, a field full of abuse and exploitation.

This amicus brief is being filed by Leonard Leigh Elias in his capacity as the Miami-Dade Consumer Advocate. The Consumer Advocate is empowered by Section 2-25.2(a) and (b) of the Code of Miami-Dade County, Florida, to represent and protect the public interest in proceedings or hearings of any nature before the courts. Public interest is defined in Section 2-25.3 of the Code of Miami-Dade County, Florida, as an interest or right arising from the Constitution, decisions of courts, common law or other laws, rules and regulations of the United States, or of this State or County, inhering in the citizens of this County or in a broad class of such citizens.

The specific interest of Miami-Dade County, as Amicus Curiae, is to regain its power and authority to regulate towing in Miami-Dade County, Florida. The overall intent of the Miami-Dade Ordinance, in this regard, is expressed in its preamble, which provides that such regulation is appropriate and necessary because:

> . . . numerous persons and firms in Dade County engage in the business of recovering, towing, removing and storing of motor vehicles; and

> . . . such towing services frequently must be provided without the prior consent of the vehicle owner, or under circumstances which prevent negotiating the charges, terms and conditions for the towing service, often resulting in disagreements and complaints between vehicle owners and providers of towing services; and
>
> . . . the vehicles and equipment used to tow vehicles across the thoroughfares of Dade County and the manner in which towing is conducted are of considerable significance to the health, safety and welfare of the owners of towed vehicles and of the residents and visitors in Dade County; and
>
> . . . this Board finds it to be in the best interest of the County, its citizens and its visitors to license and regulate the business of providing such services within Dade County, to assure that all who provide the services are fit and competent to do so and that such services are delivered in a safe and efficient manner.

The Miami-Dade Ordinance, similar to the Columbus Ordinance, addresses a variety of safety and welfare concerns, and implements certain requirements for the towing industry, including inter alia: that principals of the towing company are to undergo a criminal background check, because crime is a real concern in local municipalities; that towing vehicles are to be inspected for equipment to make sure that tows are performed in a safe and efficient manner; that insurance is to be required and verified because of the inherent danger in transporting other vehicles and inevitable accidents resulting therefrom; that standards and procedures are to be established

regulating the towing of cars from private property without the consent of the owner or driver of the vehicle because cars have been held hostage until the consumer paid exorbitant fees in cash; and that predatory practices of roadside solicitors are to be prohibited because stranded motorists are "sitting ducks" for unscrupulous towers.

SUMMARY OF THE ARGUMENT

Towing has never been a federal issue, nor is it generally a state regulated industry. Local governments have traditionally regulated the towing industry due to its complexity and need for close and local enforcement. By holding that local governments are preempted from licensing towing companies, the Sixth Circuit has effectively paralyzed local government's ability to: 1) address towing safety concerns and 2) protect their citizens from abusive towing practices.

For the following reasons, if the Sixth Circuit decision is upheld, no federal, state, or local authority will exist to regulate the towing industry. Historically, the federal government has not and – in all likelihood – will not be a source of regulatory authority for this industry. For their part, states have not regulated this industry because it is a local matter and, invariably, has been left exclusively to local governments. Unfortunately, local governments, the only remaining source of regulatory authority, who have traditionally regulated the towing industry, will be precluded from exercising that regulatory mandate if the Sixth Circuit's decision is upheld.

Inevitably, such a regulatory void will create an atmosphere of anarchy in the towing industry, which cannot be condoned or tolerated by this Court.

As expressed more fully below: (1) Congress lacks the power to preempt local governments from licensing and regulating towing activities; (2) Congress did not clearly and manifestly intend to preempt local government from licensing and regulating towing activities; (3) the Interstate Commerce Act does not prevent states from delegating to local governments the enforcement of the towing industry; and (4) licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."

Thus, Amicus Curiae respectfully requests this Court to reverse the decision of the Sixth Circuit below.

ARGUMENT

A. Congress lacks the power to preempt local governments from licensing and regulating towing activities.

When Title VI of the Federal Aviation Administration Authorization Act of 1994 (Title VI) was enacted, it was unclear whether Congress intended to include intrastate vehicle towing within Title VI's scope. In fact, the genesis of Title VI had nothing to do with towing and the district court in *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F. Supp. 364, 370 (D. N.J. 1995), referred to Title VI as a "linguistic morass." The statute simply stated that a state

or municipality may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier- . . . with respect to the transportation of property. 49 U.S.C. § 14501(c)(1). The genesis of this law stems from the decision of the United States Court of Appeals in *Federal Express Corp. v. California Public Util. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992), wherein the Ninth Circuit held that Federal Express was an air carrier for purposes of the Airline Deregulation Act of 1978 and, thus, was not subject to California's intrastate economic regulation. Consequently, Federal Express and other deregulated shippers had a competitive benefit over shippers that were not air carriers, but who were governed by state and local economic regulations. See *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F. Supp. 364, 370 (D. N.J. 1995). The intended purpose of Title VI was to "create a less regulated, uniform, market-driven economy for those who buy and sell the transportation services of motor carriage" so as to "even the playing field between air carriers and motor carriers." *Rhode Island Public Towing Ass'n v. State of Rhode Island*, 1997 U.S. Dist. LEXIS 3316, at 21-22 (D. R.I. 1977). In short, Congress intended to preempt state and local regulation of economic aspects of the shipping and trucking industries in an effort to achieve free market competition. Conf. Rep. on H.R. 2739, 140 Cong. Rec. H 7116. In 1995, Congress amended Title VI in the Interstate Commerce Commission Termination Act of 1995, to include an exemption for state and local regulations. The exemption authorizes state and local governments to enact laws relating to the price of for-hire motor vehicle transportation by a tow

truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle. The Sixth Circuit has opined that this dangling exception permits local governments to regulate prices of nonconsensual tows, while leaving undisturbed the preemptive effect of the statute as it pertains to all other aspects of the towing industry.

Amicus Curiae respectfully submits that Congress had no power to usurp the role of local governments in regulating local towing activities. There is a noticeable disparity between air carriers and trucking companies from the towing companies at issue here. Trucking companies operate mainly on an interstate basis and make their livelihood transporting goods between different states. Tow trucks, on the other hand, generally do not operate between states or even between cities for that matter, and are widely used for transportation within a single city or municipality. In fact, Miami-Dade County, Florida, is located about four hundred miles from the border with its closest neighbor, Georgia, thus posing absolutely no threat to interstate commerce. Until the decision of *R. Mayer of Atlanta v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999), Miami-Dade County regulated towing activities regularly conducted within its municipal confines. Tow trucks do not, and cannot, exist on an interstate basis and often stay within the highways and streets of one locality. Traffic control and the use of highways is an area that is peculiarly of local concern. The federal government does not regulate towing practices. Thus, there is no conflicting federal regulation in this regard. In *Railway Exp. Agency v.*

People of State of N.Y., 336 U.S. 106, 111, 69 S.Ct. 463, 93 L.Ed. 533 (1949), the Court noted:

> Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995), 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995), this Court ruled that Congress lacked power under the Commerce Clause to criminalize possession of firearms in school zones. The message signaled in that case is very clear – the federal government is not prepared to address local law enforcement duties. There must be a political accountability, and because the federal government does not, and in all likelihood will not, address local problems relating to the towing industry, there can be no federal accountability. Very simply and succinctly stated, local regulation of towing activities does not substantially affect interstate commerce. Therefore, applying the *Lopez* case to the facts in the case *sub judice*, the congressional action to preempt local governments from licensing and regulating towing companies is violative of the Tenth Amendment and is unconstitutional.

Respondents argue that local regulation of towing businesses is impermissible because it would have an negative effect on interstate commerce; however, the Court in *Maine v. Taylor*, 477 U.S. 131, 151 (1986), stated, "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values." The same Court maintained

the principle that the State "retains broad regulatory authority to protect the health and safety of its citizens . . . " *Id.* at 151. The inference drawn from these statements is that the Court should value interstate commerce, but not at the expense of the safety of the citizens of a State. Under the interpretation of the Sixth Circuit, the mere business interests of a tower is valued as more important than a consumer's health and safety.

In *People of State of California v. Thompson*, 313 U.S. 109, 112 (1941), a similar Supreme Court case regarding the implications of interstate commerce, the court stated:

> It does not appear that the regulation will operate to increase the cost of the transportation or in respects not already indicated affect interstate commerce. It is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public desiring to secure transportation by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses.

The same Court stated, "fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulations. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action." *Id.* at 115.

B. Congress did not expressly and manifestly intend to preempt local governments from licensing and regulating towing activities.

The Sixth Circuit found that Congress expressly preempted the intrastate towing industry from local regulation through Section 14501(c) of Title VI. However, there is absolutely no precise language in that section that preempts local regulation of towing. If Congress intended the State, and only the State, to regulate towing, there would have been clearer language. Nowhere in Section 14501(c) does it state language "only the State" or "no municipality or local government" or any other absolute phrase to positively prevent a local government from licensing and regulating towing companies. It is axiomatic that express preemption will be found only when the language used by Congress demonstrates clear evidence of its intent. In *California v. Zook*, 336 U.S. 725, 728 (1949), the Court stated that " . . . in a preemption test the fundamental inquiry is whether local legislation will conflict with national policy . . . ; if the activity is of predominantly local interest then state action may be permissible, but if a uniform national rule is necessary then federal preemption will be implied." The federal government does not regulate towers; therefore, no conflict exists.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator* Corp., 331 U.S. 218, 230 (1947), the court stated, "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress." Similarly, in *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942), the court stated, "The intention of Congress to

exclude states from exercising their police power over traditionally local matters, such as public safety and order and the use of streets and highways, must be clearly manifested, and the Supreme Court will not lightly infer that Congress by mere passage of a federal act has impaired traditional sovereignty of the states in that regard."

As stated previously, the intended purpose of Title VI was to "create a less regulated, uniform, market-driven economy for those who buy and sell the transportation services of motor carriage" so as to "even the playing field between air carriers and motor carriers." *Rhode Island Public Towing Ass'n v. State of Rhode Island*, 1997 U.S. Dist. LEXIS 3316, at 21-22. It is obvious that Congress did not clearly and manifestly state that local governments are preempted from regulating the towing industry. In fact, 49 U.S.C. § 13506(b) provides that:

> [e]xcept to the extent the Secretary or Board, as applicable finds it necessary to exercise jurisdiction to carry out the transportation policy of 49 U.S.C. Section 13101, neither the Secretary nor the Board has jurisdiction under this part over –
>
> (1) transportation provided entirely in a municipality . . . [or]
>
> (3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

Clearly, as per § 13506(b), the overwhelming majority of tows take place entirely within a municipality. In addition, Congress made it eminently clear that local governments could regulate emergency towing of accidentally-wrecked or disabled motor vehicles, unless the Secretary or Board found to the contrary. There is absolutely no

evidence in the record below demonstrating that the Secretary or Board found it necessary to exercise jurisdiction to carry out the transportation policy of Section 13101. Rather, the Sixth Circuit usurped the role of the Secretary or Board and made findings that are more properly reserved for the executive branch of government, not the judiciary.

Congress' specific reference to "emergency towing of an accidentally wrecked or disabled motor vehicle" in 49 U.S.C. § 13506(b)(3) clearly and manifestly establishes that local governments are not preempted from licensing and regulating the towing industry. If Congress intended totally to prohibit local governments from licensing and regulating the towing industry, with the exception of preventing price gouging for nonconsensual tows, then Congress should have expressly articulated the preemption with that language. In the absence of clear and manifest language to the contrary, local governments should be able to exercise their police powers to regulate local towing activities.

Numerous other federal decisions have dealt with the issue of federal preemption of local and state regulations, many of those decisions specifically touched on the issue of safety. Since 1997, federal courts in Indiana, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 153 F.Supp.2d 935 (S.D. Ind.Indianapolis Div. 2001), Illinois, *Caraker v. Sandoz Pharmaceuticals Corp.*, 2001 WL 1190858 (S.D. Ill. 2001), Colorado, *Bioganic Safety Brands, Inc. v. Ament*, 174 F.Supp.2d 1168 (D. Colo. 2001), New York, *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 158 F.Supp.2d 248 (N.D. N.Y. 2001), Iowa, *Wright v. Brooke Group Ltd.*, 114 F.Supp.2d 797 (N.D. Iowa 2000), Ohio, *Kemp v.*

Medtronic, Inc., 231 F.3d 216 (C.A.6 Ohio 2000), Massachusetts, *Somes v. United Airlines, Inc.*, 33 F.Supp.2d 78 (D. Mass. 1999), District of Columbia, *Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236 (C. A.D.C. 1999), South Carolina, *Casino Ventures v. Stewart*, 183 F.3d 307 (C.A.4 S.C. 1999), Pennsylvania, *Lorincie v. Southeastern Penn. Transp. Authority*, 34 F.Supp.2d 929 (E.D. Pa. 1998), Washington, *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F.Supp.2d 1213 (W.D. Wash. 1997), California *Law v. General Motors Corp.*, 114 F.3d 908 (C.A.9 Cal. 1997) and Nebraska, *Poole v. Burlington Northern R. Co.*, 987 F.Supp 753 (D. Neb. 1997), have all had safety preemption issues before their respective courts. In each instance, the courts have maintained the principle that "the presumption against federal preemption of state law is even stronger with state or local regulation of matters related to health and safety," *Caraker*, 172 F.Supp.2d at 1032.

Towing, by its very nature, involves safety and welfare issues to the public. The Washington Supreme Court stated in *Crane Towing, Inc. v. Gorton*, 89 Wash.2d. 161, 169-70 (1977), "legislation which tends to assist members of the public from involuntarily losing the use of their vehicles and which tends to expedite recovery of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public."

C. The Interstate Commerce Act does not prevent states from delegating enforcement powers to local governments relating to towing activities.

The Second Circuit, *Ace Auto Body & Towing, LTD. v. City of New York*, 171 F.3d 765 (2d Cir. 1999) and California Court of Appeals, *People v. Servantes*, 86 Cal.App.4th 1081 (C.A.5 Cal. 2001) have ruled that local governments throughout the United States should continue to license and regulate towers because 49 U.S.C. § 11501(b)(2)(A), now codified at 49 U.S.C. § 14501(c)(2)(A), provides that the preemption:

> [s]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of requirements relating to insurance requirements and self-insurance authorization.

The Sixth Circuit, however, opined that this statutory section is not applicable to local governments in the above mentioned Circuits because State law provisions omit reference to state's political subdivisions. This finding clearly conflicts with this court's ruling in *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991), wherein it was held that the failure to include "political subdivisions" when mentioning "states" in an exception to a general rule is insufficient to demonstrate a clear and manifest congressional intent to preempt states from delegating authority to political subdivisions.

States routinely delegate enforcement powers to political subdivisions because local governments are better able to protect public safety on streets and highways. For example, Florida Statute, § 715.07(9)(b) authorizes local government to enact stricter laws and to delegate authority to municipalities. That statute was created because the state recognizes that towing is a local issue and needs to be enforced on a local basis. The preamble to the Miami-Dade Towing of Motor Vehicles Ordinance, stated more fully hereinabove, graphically highlights the significant health, safety, and welfare concerns of the county. Political subdivisions clearly stand in the shoes of the State when it comes to addressing public safety concerns.

Reliance on *Russello v. United States*, 464 U.S. 16 (1983) is misplaced. The *Russello* case dealt with individual civil liberties and a Racketeer Influenced and Corrupt Organizations Act claim; however, the case *sub judice* is a business regulatory matter. The burden of proof in the criminal context is much higher and intended to require a greater amount of proof and strictness on the part of the State. In a civil context, this requisite strictness is not quite as high. The *Russello* court took its position to protect the citizen against the State in order to protect the rights and welfare of the citizen. Under that same standard, the citizen consumer should be protected as adamantly in this case at bar.

Consequently, the Sixth Circuit's interpretation that 49 U.S.C. § 11501(h)(2)(A), now codified at 49 U.S.C. § 14501(c)(2)(A), applies only to states and not political subdivisions, fails to recognize the reality of local government's role in regulating the towing industry. If Section

14501(c)(2)(A) is interpreted to completely bar local governments from enforcing towing laws, then local governments could not enforce any law that would require the tower to: obtain an occupational license; limit the distance that the vehicle can be towed; allow the motorist to inspect the vehicle for damage prior to release of the vehicle; accept an alternative form of payment from the motorist, and not demand that payment be in cash only; or engage in predatory roadside solicitation. Allowing the interpretation of § 14501(c)(2)(A) to place consumers in a dangerous and compromising position, similar to the ones mentioned above, leads to an absurd result.

If local governments are restricted to merely regulating the price of non-consent tows in a vacuum, then local government will not be able to address towing safety issues and protect their citizens from abusive towing practices. Undoubtedly, this interpretation leads to an absurd result because it permits towers to engage in abusive practices with impunity. This Court should not condone this absurd result.

D. Licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."

Respondents argue and the Sixth Circuit noted that because the towing company did not have a license, its route was adversely affected. Quite to the contrary, however, it is respectfully submitted that the "route" and "service" restrictions would only apply if local governments restrict the actual route of a tower or limit the type

of service the tower can perform. In fact, local governments do not set such restrictions and licensure is not based on "route" or "service."

If local governments are not able to license towers, citizens will be adversely affected in many ways, for instance: 1) criminal background checks on the principals of a towing company will not be performed; 2) the public will not be protected from potential thefts of motor vehicles and personal property therein; and 3) there will be no governmental entity to ensure that tow trucks, dangerous instrumentalities by their own very nature, meet minimum safety and equipment requirements and are insured. If the Sixth Circuit decision is not reversed, a tower with a criminal background and no licensure will be able to offer his towing services to a stranded motorist and, upon consent, tow and remove the motorist's vehicle with an uninsured jalopy pick-up truck that does not meet minimum weight requirements.

The business of towing is a privilege and not a right, and maintaining the minimum standard of safety and welfare to consumers, who are often helpless and put in compromising positions, should be a requirement. A tower must be required to maintain certain standards to own and operate a towing business; however, once those minimum standards are met, local ordinances do not regulate the routes taken or the services allowed.

Clearly, licensing of towers serves a vital public interest, an interest that localities and municipalities must be able to regulate. The breadth of the Sixth Circuit's opinion is overreaching, and creates an immediate chilling

effect on the obligation of local governments to protect their citizens.

CONCLUSION

For the foregoing reasons, the Amicus Curiae respectfully requests the Court to reverse the decision of the court below.

Respectfully submitted,

LEONARD LEIGH ELIAS, ESQUIRE
MIAMI-DADE CONSUMER ADVOCATE
On behalf of:
Miami-Dade County, Florida
140 West Flagler Street, Suite 903
Miami, FL 33130
Phone No. (305) 375-4199
Fax No. (305) 375-4120
Counsel for Amicus Curiae

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

(14)

No. 01-419

In The

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

vs.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, 17 CITIES, AND 6 ORGANIZATIONS AS AMICI CURIAE SUPPORTING PETITIONER CITY OF COLUMBUS

DENNIS J. HERRERA
City Attorney
City and County of San Francisco
KIMON MANOLIUS
Chief Counsel
ELLEN FORMAN
Chief Appellate Attorney
ROSE-ELLEN HEINZ*
Deputy City Attorney
Fox Plaza
1390 Market Street, Sixth Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3845
Facsimile: (415) 437-4644
E-Mail:Rose-Ellen_Heinz@sfgov.org

**Counsel of Record*

[Additional Counsel Continued On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28pp

The following Cities and Organizations join this Amicus Curiae Brief in Support of the Petitioners:

Anaheim
Moses W. Johnson, IV
Deputy City Attorney
City Attorney's Office
200 S. Anaheim Blvd. #356
Anaheim, CA 92805

California State Association of Counties
Ruth Sorensen
Executive Director
1100 K Street, Suite 101
Sacramento, CA 95814

Carpinteria
Peter N. Brown
City Attorney
Hatch and Parent
21 East Carrillo Street
Santa Barbara, CA 93101

Chicago
Mara S. Georges
Corporation Counsel
City of Chicago
City Hall, Room 600
Chicago, IL 60601

Cleveland
Richard F. Horvath
Acting Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, OH 44114-1077

Council of State Governments
Amy Scott
Hall of States
444 N. Capitol Street, NW
Suite 401
Washington, DC 20001

Dixon
Michael F. Dean
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4417

Garland
Charles M. Hinton, Jr.
City Attorney
Brad Neighbor
First Assistant City Attorney
P. O. Box 469002
Garland, TX 75046-9002

Glendale
Scott H. Howard
City Attorney
613 East Broadway, Room 220
Glendale, CA 91206-4394

International City/County Management Association
Michael Lawson
Director, ICMA Center for Performance Measurement; Public Policy
777 North Capitol Street, NE, Suite 500
Washington, DC 20002-4201

International Municipal Lawyers Association
Henry W. Underhill, Jr.
Executive Director/General Counsel
1110 Vermont Avenue, NW, Suite 200
Washington, DC 20005

La Habra Heights
Michael G. Colantuono
City Attorney
Neufeld, Jaffe, Levin & Colantuono, LLP
555 West Fifth Street, 30th Floor
Los Angeles, CA 90013

Monterey
William B. Conners
City Attorney
City Hall
Monterey, CA 93940

National Association of Counties
Edward E. Ferguson
440 First Street, NW
Washington, DC 20001

National League of Cities
Juan F. Otero, Esq.
Principle Legislative Counsel
1301 Pennsylvania Avenue, NW
Washington, DC 20001

New York City
Michael A. Cardozo
Corporation Counsel of the City of New York
Leonard J. Koerner, of Counsel
Mordecai Newman, of Counsel
New York City Law Department
60 John Street, 15th Floor
New York, NY 10038

San Diego
Leslie E. Devaney
Executive Assistant City Attorney
1200 Third Avenue, Suite 1100
San Diego, CA 92101

San Jose
George Rios
Assistant City Attorney
Office of the City Attorney
151 West Mission Street
San Jose, CA 95110

San Luis Obispo
Jeffrey G. Jorgensen
City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Santa Ana
Joseph W. Fletcher
City Attorney
P. O. Box 1988, M-29
Santa Ana, CA 92702

Sunnyvale
Valerie J. Armento
City Attorney
P. O. Box 3707
Sunnyvale, CA 94088-3707

Tracy
Debra E. Corbett
City Attorney
325 East Tenth Street
Tracy, CA 95376

West Sacramento
Robert E. Murphy
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4417

QUESTIONS PRESENTED

Amici will address the following questions:

1. Are local governments better suited than states to regulate the safety of motor vehicles, particularly with respect to towing and roads?

2. Does the Sixth Circuit's construction of the Safety Exception in the Federal Aviation Administration Authorization Act, under which states can no longer delegate to localities certain regulatory authority, violate the Tenth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

THE SIXTH CIRCUIT ERRED IN CONCLUDING THAT STATES MAY NOT DELEGATE THEIR SAFETY REGULATORY AUTHORITY OVER MOTOR VEHICLES 3

I. LOCAL GOVERNMENTS ARE BEST ABLE TO REGULATE SAFETY ASPECTS OF MOTOR VEHICLES 6

A. States must be able to delegate to local governments regulatory authority over towtrucks 6

B. States must be able to delegate to local governments regulatory authority over roads .. 11

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE SAFETY EXCEPTION VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2nd Cir.), *cert. denied*, 528 U.S. 868 (1999) 7

Brumfield Towing Service, Inc. v. City of Baton Rouge, 911 F. Supp. 212 (M.D. La. 1996) 7

California Dump Truck Owners Assoc. v. Davis, 172 F. Supp.2d 1298 (E.D. Cal. 2001) 5

Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville, 78 F. Supp.2d 725 (E.D. Tenn. 1999) 7

Crane Towing, Inc. v. Gorton, 89 Wash.2d 161 (1977) 7

Devenceze v. Fremont, No. C-02-0046-JL (N.D. Cal., filed Jan. 3, 2002) 5

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988) 16

F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) 14

Gregory v. Ashcroft, 501 U.S. 452 (1991) 16

Harris County Wrecker Owners For Equal Opportunity v. City of Houston, 943 F. Supp. 711 (S.D. Tex. 1996) 7

Interstate Towing Assoc., Inc. v. City of Cincinnati, 6 F.3d 1154 (6th Cir. 1993) 7

New York v. United States, 505 U.S. 144 (1992) 2, 13, 14, 15, 16

TABLE OF AUTHORITIES – Continued

Page

Northway Towing, Inc. v. City of Pasadena, TX, 94 F. Supp.2d 801 (S.D. Tex. 2000) 7

Ours Garage and Wrecker Service v. City of Columbus, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3426 (U.S. Jan. 4, 2002) (No. 01-419) 4

People ex rel. Renne v. Servantes, 86 Cal.App.4th 1081 (Ct. App.), *petition for cert. filed*, 70 U.S.L.W. 3162 (Aug. 14, 2001) (No. 01-336) 10

Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) ...4, 7

Printz v. United States, 521 U.S. 898 (1997).... 13, 14, 16

R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) 7

Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir. 2001) 8, 9

Tocher v. City of Sania Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001) 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. X 2, 6, 13

STATUTES AND CODES

49 United States Code
Section 14501, Federal Aviation Administration Authorization Act of 1994 ..... 3, 4, 5

49 United States Code
Section 14501(c)(2) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Low-Level Radioactive Waste Policy Act 14

California Streets and Highways Code Sections 942-942.5 11

California Vehicle Code Sections 21100(b)-(c) 11

California Vehicle Code Section 35100(c) 11

California Vehicle Code Sections 35401(d)-(e) 11

California Vehicle Code Section 35404 11

California Vehicle Code Section 35700 11

California Vehicle Code Section 35701 11

California Vehicle Code Section 35707 11

California Vehicle Code Section 35712 11

California Vehicle Code Section 35715 11

California Vehicle Code Section 35717 11

San Francisco Traffic Code Sections 28.1-28.1.106 11

San Francisco Traffic Code Sections 174-178.09 11

RULES

Supreme Court Rule
37.3 1

Supreme Court Rule
37.4 1

Supreme Court Rule
37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Howard Altman, *Towing . . . Towing . . . GONE*, Feb. 22-29, 1996 <http://citypaper.net/articles/022296/article032.shtml> 9

Charles J. Babbitt, *The Law Applied to Motor Vehicles* (4th ed. 1933) 6

Mark Belko, *Ferlo Revises Tow Truck Industry Regulation Bill*, Pittsburgh Post-Gazette, Feb. 2, 1995 9

Berkeley Davids, *The Law Of Motor Vehicles* (1911) 6

Editorial, Denver Post, Jan. 31, 1997 8

Xenophon P. Huddy, *Encyclopedia Of Automobile Law* (9th ed. 1932) 6

Institute Of Transportation Engineers, *Traffic Engineering Handbook* (James L. Pline, ed., 4th ed. 1992) 11-12

Gromer Jeffers, Jr., *Committee Endorses Plan to Regulate Tow Trucks*, Kansas City Star, Feb. 17, 2000 8

Christopher Lopez, *City Council Poses Tow-Truck Regulations*, Denver Post, May 8, 1996 9

Thom Marshall, *Racing Tow Trucks Pose Wreck Risks*, Houston Chron., Aug. 9, 2001 8

Brian Meyer, *New Rules to Target Tow Truck Operators*, Buffalo News, March 12, 2001 8

N.O. Bans Tow Truck Wreck-Chasing, Times-Picayune, April 1, 1999 9

Miguel M. Salinas, *Regulation Ends, Competition Begins for Towing*, Austin American Statesman, Jan. 1, 1995 9

Rodney White, *Change in U.S. Law Clears Road to Open New Tow Business*, Morning Journal (Martinsburg, WV), Jan. 7, 1995 12

INTEREST OF AMICI CURIAE[1]

Amicus curiae City and County of San Francisco, joined by 17 cities, submit this brief in support of petitioner City of Columbus under Supreme Court Rule 37.4. The cities are joined by six organizations whose members include state, county, and municipal governments and officials throughout the United States.[2]

This case is about whether in deregulating the motor carrier industry, Congress intended to preclude states from delegating to local governments the authority to regulate motor vehicle safety. The Sixth Circuit held that states may not delegate this regulatory authority to cities and counties.

If this Court upholds the decision, Amici will be powerless to protect their citizens from hazardous conduct and conditions related to motor vehicles, even when their states have determined that the localities are in the

---

[1] Under Supreme Court Rule 37.3(a), the parties have consented to the filing of this amicus curiae brief on behalf of the California State Association of Counties, the Council of State Governments, the International City/County Management Association, the International Municipal Lawyers Association, the National Association of Counties, and the National League of Cities. Their letters of consent have been filed with the Clerk of the Court.

Under Supreme Court Rule 37.6, Amici state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] *See* Amici listed on previous pages.

better position to protect the public. Because of the profound effect that the Sixth Circuit's holding would have on local governments throughout the country, Amici cities and organizations have a significant interest in presenting their views to the Court.

SUMMARY OF ARGUMENT

Two traditional functions of local governments have been to protect their citizens and to regulate the use of their streets. States have delegated their authority to regulate these areas because it is logical for localities to exercise these functions. Local lawmakers hear firsthand the needs and concerns of their communities, and can respond by enacting appropriate legislation. Local law enforcement officers are best able to enforce such legislation. The Sixth Circuit's ruling turns tradition on its head by eliminating cities' abilities to ensure that their streets are safe.

Congress could not have meant for the deregulation of the motor carrier industry to result in states being compelled to adopt an entirely new layer of legislation over areas that traditionally have been left to localities. In fact, if Congress intended to burden states in this manner, it has "invade[d] the province of state sovereignty reserved by the Tenth Amendment." *See New York v. United States*, 505 U.S. 144, 155 (1992).

Amici urge this Court to reverse the Sixth Circuit's holding. Adopting safety regulations with respect to motor vehicles is a critical function that is best performed by local jurisdictions. And under the Tenth Amendment,

states should not be compelled to regulate an area that they have delegated to cities and counties.

ARGUMENT

THE SIXTH CIRCUIT ERRED IN CONCLUDING THAT STATES MAY NOT DELEGATE THEIR SAFETY REGULATORY AUTHORITY OVER MOTOR VEHICLES.

In 1994, Congress deregulated motor carriers through passage of the Federal Aviation Administration Authorization Act of 1994, as amended by the Interstate Commerce Commission Termination Act of 1995, codified at 49 U.S.C. § 14501 ("FAAAA"). The FAAAA preempts the enactment or enforcement of any law related to the price, route, or service of motor carriers. Congress included three exceptions to preemption. The one at issue in this case provides that the preemption provision

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Section 14501(c)(2) (the "Safety Exception").

Ohio has granted to the localities within its borders the authority to regulate, among other things, local tow

truck operations and the use of streets within their jurisdictions. Petition for Writ of Certiorari at 4-5, *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, No. 01-419. Under this authority, Columbus passed a towing ordinance "which among other things requires the owners and operators of tow trucks to obtain a license from the City, maintain insurance, and comply with other regulatory requirements." *Ours Garage and Wrecker Service v. City of Columbus*, 257 F.3d 506, 507 (6th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3426 (U.S. Jan. 2, 2002) (No. 01-419).

In a two-paragraph opinion, the Sixth Circuit held that the FAAAA preempts Columbus' towing ordinance. The court permanently enjoined Columbus from enforcing its towing ordinance, stating that *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001), controls the disposition.

In *Petrey*, the Sixth Circuit held that none of the exceptions to preemption found in the FAAAA saved the local towing licensing scheme from preemption. *Id.* at 564. With respect to the Safety Exception, the court held that Congress did not intend for that exception to apply to municipalities. *Id.* at 560-61. The court based this holding on the statutory language of the FAAAA, finding that the omission of the term "political subdivisions" in the Safety Exception means that municipal safety regulation is not exempted from preemption. *Id.* at 562-63. The court also concluded that legislative history and purpose supported its holding. *Id.* at 563.

By holding that the Safety Exception does not apply to municipalities, the Sixth Circuit has stripped Ohio of

its power to authorize its local governments to pass safety regulations affecting motor vehicles.

Divesting cities across the country of their ability to regulate commercial tow operators within their borders will allow unscrupulous operators to wreak havoc on public safety. But the implications of the Sixth Circuit's holding go well beyond the towing industry. The decision leads to the untenable result that local governments cannot perform their traditional regulatory function of ensuring that their streets are safe for all who travel on them.[3] Motor carriers will be free to disregard municipal laws regulating the direction that traffic must flow on their streets, the routes that vehicles carrying hazardous substances may use, the size of vehicles that may travel on particular streets, and speed limits.[4]

The Sixth Circuit's decision was wrong for two reasons. First, the decision fails to recognize that local governments can regulate the safety of motor vehicles more effectively than states can. Second, the Sixth Circuit's

---

[3] *See California Dump Truck Owners Assoc. v. Davis*, 172 F. Supp.2d 1298 (E.D. Cal. 2001) (finding, based on cases decided in the towing context, 12 California statutes that delegate authority to regulate local roads to cities and counties are preempted by the FAAAA.)

[4] For example, one city in California has already been sued to stop enforcement of local safety regulations of its streets, based on the plaintiffs' contention that the FAAAA preempts the local ordinance. The plaintiffs are professional truck drivers, who are seeking to enjoin enforcement of Fremont Municipal Code sections restricting vehicles in excess of 10,000 pounds from certain city streets. *Devenceze v. City of Fremont*, No. C-02-0046-JL (N.D. Cal., filed Jan. 3, 2002).

interpretation of the Safety Exception violates the Tenth Amendment to the United States Constitution.

I. LOCAL GOVERNMENTS ARE BEST ABLE TO REGULATE SAFETY ASPECTS OF MOTOR VEHICLES.

States have traditionally delegated to municipalities and other local governmental bodies the regulation of motor vehicles. Berkeley Davids, *The Law of Motor Vehicles* § 24 at 26 (1911). *See also,* Charles J. Babbitt, *The Law Applied to Motor Vehicles* § 30 at 16 (4th ed. 1933); 1-2 Xenophon P. Huddy, *Encyclopedia of Automobile Law* § 68 at 210 (9th ed. 1932). Local governments are in the best position to efficiently and accurately determine what laws are necessary to protect the safety of their citizens. The issues faced by a small rural community are not the same as those faced by a large urban center. Safety hazards on mountainous roads are different than those on long flat surfaces. Statewide laws cannot possibly take into account all of the peculiarities of its cities and counties to adequately protect the public. To force the states to try to do so would impose an extreme burden on states and a drain on their resources.

A. States must be able to delegate to local governments regulatory authority over tow-trucks.

Cities throughout the country have enacted local towing ordinances to protect their citizens from

unscrupulous practices of tow truck operators.[5] Without such controls, a person with a tow truck wields unlimited power to take unfair advantage of and threaten the safety of vulnerable citizens. For this reason, "municipal regulation of the business of towing is not unusual." *Interstate Towing Assoc., Inc. v. City of Cincinnati,* 6 F.3d 1154, 1165 (6th Cir. 1993). Towing regulations serve important municipal interests to "promote the public safety and consumer confidence in the regulated services." *Id.* at 1164. As the Washington Supreme Court found in *Crane Towing, Inc. v. Gorton,* 89 Wash.2d 161, 169-70 (1977):

> It cannot be doubted that the unexpected loss of the use of one's vehicle directly affects the safety and welfare of vehicle operators and owners. A person may be stranded hundreds of miles from home with no alternative mode of return travel and with no place to stay until the vehicle can be recovered. Similarly, the loss of one's vehicle may substantially affect one's employment. Legislation which tends to assist members of the public from involuntarily losing the use of their vehicles and which tends to

---

[5] See, e.g., *Petrey v. City of Toledo,* 246 F.3d 548; *Tocher v. City of Santa Ana,* 219 F.3d 1040 (9th Cir. 2000), *cert. denied,* 531 U.S. 1146 (2001); *Ace Auto Body & Towing, Ltd. v. City of New York,* 171 F.3d 765 (2nd Cir.), *cert. denied,* 528 U.S. 868 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta,* 158 F.3d 538 (11th Cir. 1998), *cert. denied,* 526 U.S. 1038 (1999); *Northway Towing, Inc. v. City of Pasadena, TX,* 94 F. Supp.2d 801 (S.D. Tex. 2000); *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville,* 78 F. Supp.2d 725 (E.D. Tenn. 1999); *Harris County Wrecker Owners For Equal Opportunity v. City of Houston,* 943 F. Supp. 711 (S.D. Tex. 1996); *Brumfield Towing Service, Inc. v. City of Baton Rouge,* 911 F. Supp. 212 (M.D. La. 1996).

> expedite recovery of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public.

The necessity of safety regulations cannot be overstated. Recent events in Texas provide a stark example: The City of San Antonio had regulated and controlled "the practice of tow truck drivers from racing to the scenes of accidents." *Stucky v. City of San Antonio*, 260 F.3d 424, 437 (5th Cir. 2001). The regulation was meant to protect the public peace, safety and welfare, by preventing safety hazards at the scene of the accident that result from multiple tow trucks rushing to the scene and adding to the traffic problems already created by the accident. *Id.* at 438 n.17. The Fifth Circuit Court of Appeals struck down San Antonio's ordinance, holding that the State of Texas could not delegate its safety regulatory authority to municipalities. *Id.* at 446.

Within one week after the decision in *Stucky*, two accidents occurred in Houston involving speeding tow trucks. Thom Marshall, *Racing Tow Trucks Pose Wreck Risks*, Hous. Chron., Aug. 9, 2001. One of the accidents was fatal, and the other resulted in 18 injuries. *Id.* During that same week, 38 tow trucks showed up at one accident scene. *Id.*[6]

---

[6] The problems experienced in Houston are not atypical. *See, e.g.*, Editorial, Denv. Post, Jan. 31, 1997, at B-08 (describing hazards of tow operators racing to accidents, and noting two deaths caused by speeding tow trucks). *See also* Brian Meyer, *New Rules to Target Tow Truck Operators*, Buff. News, March 12, 2001, at 1A (reporting that city officials enacted new tow laws to protect victims and decrease wreck chasing); Gromer Jeffers Jr., *Committee Endorses Plan to Regulate Tow Trucks*, Kan. City Star,

City and county governments are in better positions than state governments to enact regulations tailored to prevent the type of accidents that occurred in Texas. For example, cities know whether regulations aimed at limiting tow truck drivers from rushing to accidents are necessary because cities can track accidents involving tow trucks. *See Stucky v. City of San Antonio*, 260 F.3d at 437 n.16. Local governments are also the more appropriate bodies to administer permitting schemes for tow truck operators within their jurisdictions. Local law enforcement officers are likely to receive complaints about tow truck operators, and should be able to take direct action

---

Feb. 17, 2000, at B1 (same); *N.O. Bans Tow Truck Wreck-Chasing*, Times-Picayune, April 1, 1999, at B3 (same); Christopher Lopez, *City Council Poses Tow-Truck Regulations*, Denv. Post, May 8, 1996 at B-03 (describing reason for Denver City Council's personnel and public safety committee considering new tow regulations to be in response to towing "free-for-all" in which tow operators conduct unnecessary and unwarranted tows and charge exorbitant fees); Mark Belko, *Ferlo Revises Tow Truck Industry Regulation Bill*, Pitt. Post-Gazette, Feb. 2, 1995 at B5 (describing new bill by Council president as regulating towing "as an effort to prevent people from being ripped off by unscrupulous operators" and to protect vulnerable people); Miguel M. Salinas, *Regulation Ends, Competition Begins for Towing*, Austin Am. Statesman, Jan. 1, 1995 (City/State Section) (reporting that Austin police and tow truck companies are preparing for "wrecker wars" and "chaotic" collision scenes in wake of deregulation of the industry); Howard Altman, *Towing . . . Towing . . . GONE*, Feb. 22-29, 1996 <*http://citypaper.net/articles/022296/article032.shtml*> (describing tow operators who "chase" accidents, tow disabled vehicles, then charge higher fees than were disclosed at the accident scene, or increase the damage to a vehicle to increase the price of the repair, which will increase the amount of money they get from the auto repair shop).

in response to such complaints. Local governments can also more easily monitor whether tow truck operators are complying with requirements aimed at protecting the public safety than a statewide agency, which would be charged with monitoring the activities of every tow operator within the entire state.

The experience of one driver in San Francisco highlights the relevance and importance of local regulation and enforcement of tow trucks. The driver was stranded late at night at the parking lot where he had earlier parked his car, which was now missing. *People ex rel. Renne v. Servantes*, 86 Cal.App.4th 1081, 1091-92 (Ct. App.), *petition for cert. filed*, 70 U.S.L.W. 3162 (Aug. 14, 2001) (No. 01-336). After tracking down the company that had towed his vehicle, the man took a taxi to a desolate, industrial area of town where the company's tow yard was located. *Id.* Out of concern for his safety, he paid the taxi driver to stay at the yard with him while he waited for the tow operator to arrive and release his car to him. *Id.* He ran out of money after 20 minutes, the taxi left, and the man waited for almost an hour alone. *Id.* When the tow operator finally arrived, he refused to accept a credit card for payment of the tow. *Id.* The tow operator drove the towed driver to an automated teller machine, where the driver had to withdraw the cash to pay for the tow. *Id.*

San Francisco's tow ordinances, which require tow operators to, among other things, obtain a permit from the Chief of Police, notify the City's tow desk upon conducting a tow, maintain records of towed vehicles, and accept cash, check, or credit card in payment for services, are aimed at protecting the safety of San Francisco's citizens like the driver in the above example.

B. States must be able to delegate to local governments regulatory authority over roads.

States have also deemed it appropriate to delegate to local governments the safety regulatory authority over motor carriers in contexts other than towing.[7] Under this authority, cities ensure their roads are safe by adopting use restrictions on a street-by-street basis.[8]

Common restrictions that localities impose on roads within their jurisdictions include speed limits, prohibitions against turns at red lights, weight restrictions, height restrictions, and one-way direction of travel restrictions. Detailed findings are necessary to develop regulations that are appropriate and reasonable. For example, factors that must be considered to determine the proper speed limitation on a street include, among other things: (1) prevailing vehicle speeds; (2) spacing of intersections; (3) restricted sight distances or view obstructions; (4) long, steep downgrades or hills; (5) accident experience; (6) traffic volumes; and (7) vehicle-pedestrian conflicts. Institute of Transportation Engineers, *Traffic*

---

[7] For example, California has at least 10 statutes that authorize local authorities to pass regulations related to the safety of motor vehicles on roads within their jurisdictions under specified circumstances. Cal. Veh. Code §§ 21100(b)-(c), 35100(c), 35401(d)-(e), 35404, 35700, 35701, 35707, 35712, 35715, 35717 (2000); Cal. Sts. & High. Code §§ 942-942.5 (1990).

[8] *See, e.g.* San Francisco, Cal., Traffic Code §§ 28.1-28.1.106 (2000) (listing 106 streets in San Francisco on which it is unlawful to operate a vehicle in excess of 6,000 pounds); San Francisco, Cal., Traffic Code §§ 174-178.09 (2001) (establishing speed limits on 96 streets in the city).

Engineering Handbook 348 (James L. Pline, ed., 4th ed. 1992).

Moreover, it is easy to understand why the route of a higher, wider, longer, or heavier than standard vehicle must avoid streets with low utility lines, low tunnels, narrow streets, or steep grades. Local traffic engineers know which streets have these conditions, and by regulation and permitting can safely guide extra-large vehicles through a town or city.

A state cannot make the requisite detailed findings as to the necessity of safety regulations of every road or street within its borders.[9]

These determinations are best left to local officials, who are familiar with the intricacies of their roads. Without the authority to exercise control over how motor carriers use their roads, cities and counties are unable to perform this very essential function.

---

[9] *See, e.g.*, Rodney White, *Change in U.S. Law Clears Road to Open New Tow Business*, Morning Journal (Martinsburg, WV), Jan. 7, 1995 at A1 (noting that residents of "coal-producing counties where large 18-wheelers are used to haul coal from remote mining sites to rail heads and river barge companies" complain that "the state doesn't do enough to stop the owners and operators of these trucks from carrying overweight loads that destroy roads").

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE SAFETY EXCEPTION VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Under the Sixth Circuit's interpretation of the Safety Exception, states must either assume responsibility for adopting statewide safety regulations covering all streets and all tow operators within the state, or abdicate that responsibility and leave the states' residents with no motor vehicle safety regulations at all. Interpreted this way, the Safety Exception violates the principles of dual sovereignty protected by the Tenth Amendment, because Congress is effectively mandating how states govern the area of motor vehicle safety.[10]

It is "fundamentally incompatible with our constitutional system of dual sovereignty" for the federal government to "issue directives requiring the States to address particular problems." *Printz v. United States*, 521 U.S. 898, 935 (1997). Thus, "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. at 162 (citation omitted). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to

---

[10] The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

compel the States to require or prohibit those acts." *Id.* at 166. "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.*

Congress may encourage a state to adopt certain regulations that are consistent with federal interests. *Id.* at 171-174. But such encouragement is constitutionally valid only if states have a choice of whether to institute those regulations. *Id.* at 174. *See also F.E.R.C. v. Mississippi*, 456 U.S. 742, 764-65 (1982) (upholding mandate to states to consider federal standards, where nothing compelled states to enact legislation). Otherwise, states lose "an essential attribute of [their] retained sovereignty [-] that they remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. at 928. (citation omitted.)

For example, in *New York v. United States*, the Court considered the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Act. In those provisions, Congress sets forth a series of incentives to states to provide for the disposal of the radioactive waste generated within their borders. *New York v. United States*, 505 U.S. at 150-51. This Court upheld the two sets of incentives that provided states with a true choice. In the first, the states could choose between regulating according to the federal plan or foregoing federal funds. *Id.* at 173. The second permissible incentive provided that states "may either regulate the disposal of radioactive waste according to the federal standards . . . , or their residents who

produce radioactive waste will be subject to federal regulation." *Id.* at 174.

In contrast, this Court struck down the third incentive in the statute. Under that provision, a state could either regulate consistent with the federal plan, or take title to the radioactive waste within its borders, and would be subject to damages for failing to do so promptly. *Id.* at 174-75. Because both options under the third alternative were "coercive regulatory techniques," the Court found that states were not provided with a choice of whether to accede to federal regulation. *Id.* at 176.

Congress has specifically absolved itself of the responsibility for protecting the public with respect to motor vehicles. 49 U.S.C. § 14501(c)(2). Rather, Congress has left it to the states to protect the public in this critical area. *Id.*

Under the Sixth Circuit's interpretation of the Safety Exception, however, Congress has coerced the states to regulate the safety of motor vehicles in a particular manner – that is, on a statewide rather than local basis. Congress has taken away the ability of the states to fulfill their obligation with the approach that each state deems is in the best interests of its citizens, and respects the views of the local electorate. *See New York v. United States*, 505 U.S. at 168-69. Accordingly, states may no longer exercise their authority by determining that its localities are in the better position to decide what regulations are necessary, or that the resources that would be required to institute intricate safety regulations statewide are better spent on other priorities.

This interpretation leaves states with two alternatives. The first is to do nothing. But not adopting any regulations related to the safety of motor vehicles "is no choice at all." *Id.* at 176. That "alternative" would leave tow-truck operators entirely unregulated, and roads entirely unrestricted.

Therefore, the only real alternative available to states under the Sixth Circuit's ruling is to adopt, on a state level, new extensive, detailed laws on subjects that are otherwise best left to local regulation. States would have to institute statewide licensing schemes for tow operators, to monitor the activities of those operators, and to enforce the laws against operators who do not comply with the regulations. States would also have to develop intricate regulations relating to every road within its borders, based on which roads need speed limits, size and weight restrictions, or travel restrictions to be safe. It is not within the purview of Congress to displace a state's accountability to its electorate by dictating how that state will expend its own resources. *Printz v. United States*, 521 U.S. at 919-20.

The Sixth Circuit's interpretation of the Safety Exception ignores fundamental precepts of statutory construction and federalism because it will "upset the usual constitutional balance of federal and state powers," *New York v. United States*, 505 U.S. at 170, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and because the Court must avoid the constitutional problems created by such interpretation. *Id.*, citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). The only interpretation of the Safety Exception that will avoid constitutional problems allows

states to delegate to local governments the safety regulatory authority of motor vehicles.

CONCLUSION

Amici urge the Court to reverse the decision of the court below.

DATED: February 19, 2002

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
KIMON MANOLIOUS
Chief Counsel
ELLEN FORMAN
Chief Appellate Attorney
ROSE-ELLEN HEINZ
Deputy City Attorney

Attorneys for Amicus Curiae
City and County of San Francisco

(15)

Supreme Court, U.S.
FILED
FEB 19 2002
OFFICE OF THE CLERK

No. 01-419

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF COLUMBUS,
PETITIONER,

v.

OURS GARAGE AND WRECKING SERVICE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONERS

Kenneth B. Clark*
1449 Pennsylvania AVE, SE
Washington, DC 20003
*Counsel of Record

29 pp

QUESTION PRESENTED –

May Congress Constitutionally Preempt municipal safety regulations regarding local tow-truck operations?

TABLE OF CONTENTS

page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Lopez and its progeny have created a need for greater clarity in defining the limits of Commerce Clause power 3

II. Commerce power is limited by States' traditional Police Powers 5

A. Congress' commerce clause enactments must not usurp areas of tradition local jurisdiction. 10

B. Return to the traditional View Of local Police Powers is required by *Lopez* 16

C. There are also limits implicit in the words "commerce" and "among the states" 18

III. Fundamental Principles of Federalism are at Stake 22

CONCLUSION 23

Table of Authorities

	Page
CASES	
Brown v. State of Maryland, 12 Wheat. 445 (1827).	17
City of New York v. Miln, 36 US 102 (1837).	13
Garcia v. San Antonio, 469 U.S. 528 (1985).	4-6, 8-10, 12, 20-24
Gibbons v Ogden, 9 Wheat. 1,6 (1824).	6
Gregory v Ashcroft, 501 U. S. 452 (1991).	5, 22
INS v. Chadha, 462 U.S. 919 (1983).	23
Jones v. US, #99-5739, (2000).	3, 15, 20
Lopez v US, 514 US 550 (1995).	3, 4, 7-9, 14-16, 19,20
National League of Cities v. Usery, 426 U.S. 833 (1976).	9-13
New York v. US, 505 U. S. 144 (1992).	5, 7, 9, 19
Patterson v. Kentucky 97 U.S. 501 (1878).	16
Printz v. US, 521 US 98 (1997)	5, 7
US v. Morrison, # 99 - 5 (2000)	8, 9, 15, 18, 20, 21
Wickard v. Filburn, 317 U. S. 111 (1942)	4
Wirtz v. Maryland, 392 U.S. 183 (1968)	10, 11

Historical and Legal Sources	page
Cooley, Thomas. *Constitutional Limitations*.	16
Currie, David. *The Constitution in the Supreme Court* (U. Of Chicago, 1990).	4
Madison & Hamilton, *The Federalist*.	5

INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner and counsel to the respondents have consented to the filing of this amicus brief. Consent letters are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The issues raised in this case present fundamental questions about the division between local and national issues: which areas of regulation are appropriate for Congress and which areas are reserved to State and local government within the true meaning of the Tenth Amendment.

Since this Court handed down its decision in *Lopez v. US* (514 US 550) seven years ago, there has been renewed uncertainty about the extent of Congress' commerce clause powers, because this Court has seemed to take a significant step back from earlier decisions yet without explicitly overruling them. Various members of this Court (Justice Souter in dissent, but also Justice Thomas in concurrence) suggested that *Lopez* was in fact a substantial modification of this Court's commerce clause jurisprudence.

We believe that this Court's commerce clause jurisprudence could be clarified greatly in the current case by explicitly overruling some of the earlier decisions which no longer seem valid in light of recent decisions, and setting forth clear boundaries between federal and local powers.

---

[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

In *Garcia v. San Antonio* (469 U. S. 528 (1985)), by a 5-4 vote, the majority declared that whatever limitations there were on the commerce clause powers of Congress that Congress alone was to decide those limits. Although *Garcia* has never been explicitly overruled (and this reasoning about the scope of the commerce clause power could perhaps be considered mere dicta, not requiring an explicit renunciation) the view that commerce clause power is to be determined exclusively by the legislative branch has been quite openly rejected in *New York v. US* (505 U. S. 144 (1992)), *Lopez v. US* (1995) and *Printz v. US* (521 US 98 (1997)), and *US v. Morrison* (# 99 - 5). In each of which cases this Court has rejected the *Garcia* reasoning and embraced the view that this Court will enforce limits on the power of Congress under the commerce clause.

Since *Garcia* has been implicitly undermined by more recent decisions (*Lopez*, et al), it ought to be explicitly abandoned.

If *Garcia* has been implicitly overruled it would make sense to return to something like the *status quo ante*, as expressed in *National League of Cities v. Usery* (426 U.S. 833 (1976), in which the court noted that traditional areas of local responsibility (or police powers) were a buffer to the commerce clause powers of Congress, an approach suggested by Justice Scalia in *Lopez*, as well as by later decisions.

A proper analysis of the limits of the commerce clause must focus not simply on the effect of economic regulation but take into account the broader understanding of what areas are of "traditional state concern" and thus fall under the police powers of the local community.

ARGUMENT

I. Lopez and its progeny have created a need for greater clarity in defining the limits of Commerce Clause power.

This Court has repeatedly noted, most recently in *Jones v. US* [#99-5739, (2000)] that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter." Following that rule in the current case this Court might be tempted to simply rule that given the questionable constitutional nature of Congress preempting municipal licensing and safety regulations that 49 U.S.C. 14501(c) should be interpreted as allowing the city regulations at issue in the current case.

There is much to be said for the Second Circuit's conclusion that:

> Congress' aim to leave the states' residual control over safety and other local concerns intact, and the presumption against preemption of historic state police power, argue against finding preemption where only incidental economic burdens can be discerned. In the present circumstances, where these competing concerns collide, we are persuaded, for reasons we will explain in a moment, that the starting presumption against preemption of state law has not been overcome. [*Ace Auto Body v City of N.Y.*]

Nevertheless, we believe that a narrow ruling by this Court focusing on statutory interpretation would leave very important constitutional questions unanswered. While the Court tries to avoid ruling on broad constitutional questions where they can be avoided, in his concurring opinion in *Lopez*, Justice Thomas wrote: "At an appropriate juncture, I think we must modify our

Commerce Clause jurisprudence." We respectfully submit that the time has arrived.

We believe that this Court has a duty to give clear instruction to lower courts as well as to Congress and local governments regarding the proper division of powers and the limits of Congress' commerce clause powers.

There was a time that the Court's commerce clause jurisprudence was so ambiguous that it provided no clear guide. As David Currie has written about the state of commerce clause jurisprudence at the turn of the last century:

> Prediction of the fate of any state law had become extremely hazardous. None of the Court's tests suggested clear solutions to particular controversies, and the Justices had compounded the confusion by employing different tests in successive cases. Nor were the results easy to reconcile on any theory; by the time Fuller's term began there were precedents to justify almost anything the Court choose to decide.[2]

Something similar seems to have now occurred since the decision in *Lopez*. It is hard to see how *Lopez* and earlier decisions such as *Garcia* and, perhaps, *Wickard* (317 U. S. 111 (1942)), can all be considered "good law."

---

[2] David Currie, *Constitution in the Supreme Court: The Second Century* (U. Of Chicago, 1990), 31.

II. Commerce power is limited by States' traditional Police Powers

Congressional preemption of the type of local safety regulations involving tow-trucks and tow-truck licencing being challenged by the City of Columbus, clearly goes beyond the powers of Congress under the ability to regulate commerce among the states, and intrudes into an area of law reserved "to the States or to the people."[3]

In Federalist 45 James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

These words have been cited by this court over and over in recent years as the central expression of the founders regarding the division of powers between local and national government, particularly with reference to analyzing the commerce clause powers of Congress (e.g. dissent in *Garcia*, *Gregory v Ashcroft* (501 U. S. 452 (1991)), , *New York v. US*, *Lopez v. US*, *Printz v. US*).

---

[3] It is not our intention in this brief to discuss at length the proper interpretation of 49 U.S.C. §§ 14501 which is being adequately address elsewhere, but to suggest a broader approach which the Court might adopt and which could clarify broader Constitutional issues.

Over the last 70 years, the powers of Congress to legislate under the banner of the "commerce clause" grew at a rapid and constant rate. There is no need to summarize that line of cases here, which is well known to this Court, but suffice it to say that the power of the several states to regulate internal commerce went from an "immense mass of legislation which embraces everything within the territory of a state" (*Gibbons v Ogden*, (9 Wheat. 1,6 (1824)) to power bordering on the trivial and insignificant (*Garcia* dissent (469 U.S. 528, at 575). This expansion reached its furthest limit in *Garcia v. San Antonio* when the Court ruled by a 5 to 4 margin that, in effect, the Constitution placed no limits upon what Congress could legislate under the commerce clause, but that the outer limits of the commerce clause power was a "political question" to be decided by the ordinary political process. The majority asserted that:

> the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government [i.e. Congress] itself, rather than in discrete limitations on the objects of federal authority. . . . The political process ensures that laws that unduly burden the States will not be promulgated.[4]

As Justice Powell wrote for the dissent which included Justices Rehnquist and O'Connor:

> Today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the

[4] This doctrine had roots in *Wickard v. Filburn* which declared "*effective* restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes," 317 U.S., at 120. We believe there is more than ample historical evidence against this assertion.

> Commerce Clause . . . the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that it - an unelected majority of five Justices - today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court. [469 U.S. 528 at 561]

That line of cases expanding the commerce clause power came to an abrupt halt – if not an about face – in *Lopez v. US.*[5] A number of cases before and since Lopez have rejected the view that the limits of the commerce clause powers are to be left at the discretion of Congress. In both *New York v. US* (1992) and *Printz v. US* (1997), for example, this court has ruled that Congress exceeded its commerce clause authority – thus openly rejecting the central premise of the majority opinion in *Garcia*. As this Court declared in *Lopez*: 'It does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance."

[5] *Lopez* declared quite humbly that "The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." Despite such a characterization, most observers regarded *Lopez* as a substantial step back.

It was the dissent in Lopez which noted that the decision "flatly rejected" *Garcia* (Souter, in dissent sect. IIa).[6] While the majority opinion failed to make mention of Garcia, it is hard not to agree with Justice Souter on this point: *Lopez* was a complete rejection of the central tenets of *Garcia*. In seeming direct response to *Garcia* but without mentioning it by name, Justices Kennedy and O'Connor in their concurring opinion in *Lopez* declared:

> The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.... But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.

Citing this concurring opinion from *Lopez*, the Chief Justice, writing for the majority in *Morrison*, added that "the limitation of congressional authority is not solely a matter of legislative grace." The Chief Justice thus seemed to bring to conclusion the statement in his dissent in *Garcia* that "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."

---

[6] In his dissent in *Morrison*, Justice Souter wrote: "The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U. S. C. §§13981, exceeds Congress's power under that Clause. I find the claims irreconcilable." Souter spent several pages in his dissent defending Garcia and explaining what he saw as the contradiction between *Garcia* and the *Lopez/Morrison* cases.

It was perhaps understandable that the decision in *Lopez* should decline to explicitly overrule *Garcia*, for any number of reasons. Perhaps one reason is that it was a criminal case, as well as the desire to avoid a change which appeared too abrupt. The current case in which a city re-asserts its Tenth Amendment reserved powers in response to an overreaching of the commerce clause, is perhaps a better vehicle for addressing the federal-state balance than a criminal case.

As Justice Thomas said reflecting on the state of commerce clause jurisprudence in light of *Lopez*: "I think we must modify our Commerce Clause jurisprudence." The central tenet of *Garcia* has been rejected and is no longer "good law."

If, as we believe is abundantly clear, *Garcia* has been implicitly overturned, it makes sense to explicitly return to something like the *status quo ante*, requiring us to take a look at the case overturned by *Garcia*, *National League of Cities v. Usery* (426 U.S. 833), and the majority opinion in that case penned by a youthful Justice Rehnquist. Not only has *Garcia* been undermined (if not rejected outright), but this Court (certainly as early as 1992 in *New York v. US*) explicitly embraced the view that the Tenth Amendment and the sovereignty inherent in the States places a firm limit upon the powers Congress can exercise under the commerce clause.

It was again Justice Souter who declared in his dissent in *Morrison* that, "The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery*." If in fact, as Justice Souter himself suggested, *Garcia* is incompatible with *Lopez* and *Morrison* then the decision in *Garcia* is de facto repudiated. If *Garcia* is no longer valid then *Usery* is once again "good law" and it makes perfect sense for this

Court to make use of the kind of analysis laid out by Justice Rehnquist in that case. In other words, it is *Garcia*, rather than *Usery* which should be considered "now-repudiated."

A. Congress' commerce clause enactments must not usurp areas of tradition local jurisdiction.

The essential question in the current case is: what are the limits of congressional power under the commerce clause in areas traditionally regulated by the states?

The decision in *National League of Cities*, of course, overturned a decision some years earlier in *Wirtz v. Maryland* (392 U.S. 183 (1968)), and the discussion of why that decision was wrong raises the crux of the issue:

> *Wirtz* relied heavily on the Court's decision in *United States v. California*, 297 U.S. 175 (1936). The opinion quotes the following language from that case:
>
> > "`[We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.' 297 U.S., at 185 ." 392 U.S., at 198 .
>
> But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. *We think the dicta from*

> *United States v. California, simply wrong.* Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow "the National Government [to] devour the essentials of state sovereignty," 392 U.S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. (426 U.S. 833, at 855; emphasis added)

Thus the Court in *Usery* says quite clearly that it should "look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon" both the federal taxing power *and* federal commerce clause power. The power to tax is the power to destroy, but just as surely the power to regulate is the power to destroy, and the power to prohibit (or preempt) is the power to destroy.

To quote the dissent in *Wirtz*:

> In the area of taxation . . . the Court has recognized that the constitutional scheme of federalism imposes limits on the power of the National Government to tax the States. The Court will not permit the Federal Government to utilize the taxing power to snuff out state sovereignty; recognizing that the power to tax is the power to destroy. The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard v. Filburn*, 317 U.S. 111, may be regulated and controlled by Congress. Commercial activity of every stripe may in some way interfere "with the [interstate] flow

> of merchandise" or interstate travel. . . . If constitutional principles of federalism raise no limits to the commerce power . . . then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. (392 U.S., at 205)

If Congress can simply preempt and supplant state regulation of any economic activity then what is left of sovereignty and separation of powers? State and local government would be reduced to a de facto subdivision, exercising only those powers Congress allows. The Tenth Amendment would not only cease to exist but be turned upside down. Rather than Congress exercising only those enumerated powers delegated to it by the States when the Constitution was adopted, state and local government would now be permitted to exercise only those powers delegated (or allowed) to them by Congress.

Justice O'Connor suggested something very similar in her spirited dissent to *Garcia*:

> Because virtually every state activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. . . . As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic. . . . With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.
>
> It is not hyperbole to note that such a circumstance amounts

to a complete destruction of sovereignty. If one political entity enacts legislation only at the sufferance of another entity and that sufferance may be removed at any time, then the first entity is not truly sovereign, but dependent. The view that states can be reduced to dependent entities of the federal government (in effect, political subdivisions, rather than sovereign semi-autonomous units) was addressed and rejected by Justice Rehnquist in *National League of Cities*:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.
>
> This is a way of saying that the Tenth Amendment encompasses more than just prohibiting Congress from exercising powers not enumerated. It points out that in exercising its enumerated powers, Congress must also respect the limits established by the division of powers. More specifically, in exercising its power to regulate commerce among the states, Congress must not usurp traditional functions of local government – commonly referred to as "police power." The powers exercised by the federal government under the commerce clause cannot become so broad that they swallow up traditional functions of local government such as education, law enforcement, emergency medical services, traffic control and the like.

This common sense understanding of the limits of the commerce clause power was articulated a century and half ago by the Court in *City of NY v Miln* (36 U.S. 102 (1837)) where it distinguished between police regulations having an effect on commerce and direct controls on interstate commerce:

Quarantine laws are commercial in their nature, and they are the regulations of the states. They have been recognized by an act of congress. (1 U. S. Stat. 619.) . . . they materially interfere with, and affect commercial and shipping transactions. . . . Health laws, poor laws, laws respecting the landing and storing of gunpowder, are all necessary for the safety and security of the particular states, or of the inhabitants of those states; and they are in nowise necessary or proper to be intrusted to the general government, and do not, therefore, come within the object for which it was established. They are not embraced within its words; and are, therefore, not taken from, but necessarily remain proper subjects of the state regulation; although they may in some respects have an influence and bearing on the commerce of the country.

This understanding of local government's police powers as a buffer on the commerce clause power of Congress follows naturally from what was articulated in *Lopez*, when the majority noted, "Were the Federal Government to take over the regulation of entire *areas of traditional state concern*, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." Again:

> "[If] Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ... , it is difficult to perceive any limitation on federal power, even in *areas such as criminal law enforcement or education where States historically have been sovereign*. Thus, if we were to accept the Government's arguments, we are hard pressed to

> posit any activity by an individual that Congress is without power to regulate."

In conclusion *Lopez* noted: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." The clear implication in these words is that the powers traditionally exercised by State and local government, help to make clear the outer limits of the commerce power.

This is certainly how these words were interpreted by a unanimous court in *Jones v. US*: "In holding that a statute making it a federal crime to possess a firearm within 1,000 feet of a school exceeded Congress' power to regulate commerce, this Court, in *United States v. Lopez*, stressed that *the area was one of traditional state concern*" (# 99-5739 at sec. b).

The Court in *US v. Morrison* once again expressed these concerns noting: "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other *areas of traditional state regulation* since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." Thus the court in its last few decisions regarding the scope of the commerce clause has emphasized the need to prevent Congress from intruding into "areas of traditional state regulation."

It is also significant that the dissent in *Lopez* and *Morrison* also read the decisions that way. Justice Souter in *Morrison* expressed his "objection to reviving traditional state spheres of action as a consideration in commerce analysis."

B. Return to the traditional View Of local Police Powers is required by *Lopez*

We must assume that Justice Scalia in *Lopez* used the words "general police power" in their traditional and historical sense. For example, Thomas Cooley, in outlining the idea of police power inherent in each of the states wrote:

> The police power of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights . . .
>
> "This police power of the State," says another eminent jurist "extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state." (Cooley, Const. Limit., Ch 16, Police Power of the States)

While, as Currie noted (op. cit.), almost any view of the commerce clause can find precedent in some ruling, the view that general police powers are an area of traditional state concern which were long regarded as exclusive to local government can hardly be contested:

It is worth quoting *Patterson v. Kentucky* (97 U.S. 501 (1878)), at some length and noting its citation on this point:

> "In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.' Cooley, Counst.

> Lom. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the existence of such a power in the states has been uniformly recognized in this court. Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; License Cases, 5 How. 504, 12 L. ed. 256; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Henderson v. New York (Henderson v. Wickham) 92 U.S. 259 , 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465 , 24 L. ed. 527; Boston Beer Co. v. Massachusetts, 97 U.S. 25 , 24 L. ed. 989. It is embraced in what Mr. Chief Justice Marshall, in Gibbons v. Ogden, calls that 'immense mass of legislation' which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control.' [Patterson, 97 U.S. 501 at 503]

We might also site *Brown v. State of Maryland*, 12 Wheat. 445, at 447: "All those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

If this Court were to uphold Congressional preemption of the type of tow truck regulations at stake here, it is difficult to conceive of any rational limitations on the power of Congress. It is worth considering for example, that Congress did explicitly exempt certain types of safety regulations from preemption in 49 U.S.C. 14501. Is this exemption Constitutionally required or is the continued existence of any safety regulation which "substantially affects interstate commerce" merely exercised until Congress decides to revoke it? If Congress can preempt safety regulations for tow trucks why not passenger vehicles? Surely state licencing

requirements for passenger vehicles substantially affect interstate commerce.

We believe the answer to this question cannot be found in a mere analysis of what it means to "substantially affect interstate commerce" but must be sought in the very fabric of federalism itself, and analysis of the "traditional areas of local jurisdiction." The Second Circuit was correct in labeling the towing regulations at issue in this case an "historic state police power." Such an historic power of municipal governments may not constitutionally be absorbed by the federal government simply because they "affect commerce."

C. There are also limits implicit in the words "commerce" and "among the states"

There remain, of course, difficult questions about where a municipal police power ends and the power of Congress to regulate commerce begins. Nevertheless, we believe that in order to guard the important values of federalism and local self-government there should be a clear attempt made to distinguish between commerce "among the states" and commerce which is "internal to a state" as well as to distinguish between actions which are "commercial" and those which are not.

In *Morrison* the Chief Justice for the Court wrote "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." We respectfully suggest that, a "categorical rule" stating that noneconomic activity is beyond the reach of the commerce power would indeed be very helpful.

As Justice Thomas wrote in his concurring opinion in *Lopez* : "Under our jurisprudence, if Congress passed an omnibus 'substantially affects interstate commerce' statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Such a formulation of federal power is no test at all: it is a blank check." Justice Thomas has suggested the need for putting some limits on this blank check. The statement that the Court has simply *not yet* allowed Congress to regulate noneconomic activity leaves the door (or the checkbook) wide open. The regulation of ordinary noneconomic activity, is an area of law reserved to local governments.[7]

A second implicit restriction in the commerce clause is between matters of local and of national concern. As Justice O'Connor wrote for the majority in *New York*:

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. . . . The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly

---

[7] Justice Thomas in section 2 of his dissent also ably distinguished between "commerce" properly understood, and other forms of non-commerical economic activity.

come within the scope of Congress' commerce power.

We believe that the decisions in *Lopez, Morrison* and *Jones* require a much stronger distinction to be made (than the court might have made 20 years ago) between national and local, as well as between actions which are "commercial" and those which are simply affect commerce in some broad sense.

As late as 1938 this Court still declared:

> "The subject of federal power is still `commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains." 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' (*Santa Cruz Co. v. Labor Board*, 303 U.S. 453, 466).

As Justice White noted:

> It is clear from the debates leading up to the adoption of the Constitution that the commerce to be regulated was that which the States themselves lacked the practical capability to regulate. See, e. g., 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937); The Federalist Nos. 7, 11, 22, 42, 45. (*Garcia* dissent)

This seems to be the clear meaning of Madison's statement in Federalist 14 that: "In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic [that is, the states], but which are not to be attained by the

separate provisions of any."

This was clearly the original understanding of the phrase "commerce among the states." It has been acknowledged by this Court that the understanding of "commerce among the states" differs dramatically from the understanding those words had for the Founding generation.[8] This Court will probably not return to the original intent of the Founders, but we think that it is good to bear in mind just how far commerce clause jurisprudence has strayed in the last century, and the important affects that change has had on local government.

It is good to bear in mind, for example, that when Franklin Roosevelt took office municipal and county government collected about 55% of total government revenue – more than twice as much as the federal government. Today federal share of revenue has risen to nearly 70%, and the local share is barely above 10%.[9] Local government, once the most important (and still the most democratic and representative level of government) has been reduced to playing an almost trivial role in American society. It is true that most of the functions affecting people in their daily lives are still run by local governments (schools, libraries, fire protection, police, ambulance, health inspection, water and sewage, waste disposal, and so on) but all of these function have increasingly come under federal supervision and control. The

---

[8] "[O]ur interpretation of the Commerce Clause has changed as our Nation has developed. We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB* v. *Jones & Laughlin Steel Corp.*, (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted" (Morrison).

[9] Source, The Tax Foundation, "The Price of Civilized Society," 2000.

expansion of the commerce clause has been a major part in this shift, as more and more functions, once thought to inhere primarily in municipal government, have been preempted and usurped by Congress.

III. Fundamental Principles of Federalism are at Stake

Justice White noted in his *Garcia* dissent that:

> [T]he harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities*, 426 U.S., at 846 -851. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. ante, at 546. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.
>
> As Justice O'Connor agreed in her opinion in *Gregory*:
>
> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Every time Congress takes over another function of local government all of these important aspects of federalism are

damaged. The increasing prospect of uniform commercial regulations throughout the United States threatens to utterly destroy these advantages of federalism. It is also beneficial to note that these advantages of federalism have been embraced by all members of the Court. Even the dissenting Justices in *Morrison* declared: "No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty--both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home"(Justice Breyer, joined by JJ. Stevens, Souter and Ginsburg).

It is an axiom that "power given will be exercised" This Court has previously noted "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ."(*INS v. Chadha*, 462 U.S. 919 at 951 (1983)). If Congress is given the green light to regulate any and all economic activity under the auspices of the commerce clause the result would be that "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint" (O'Connor, dissent in *Garcia*).

CONCLUSION

Justice White wrote in his dissent for *Garcia*:

> In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S., at 851 . Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-

> government. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee. We recognized that "it is functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them.

We believe these are wise and profound words. Moreover, the type of municipal towing regulations at stake in the current case clearly fall into the type of "traditional government function" remote from any normal concept of interstate commerce. Yet, the values of local democratic self-government at stake in the case go far beyond mere towing regulations. If Congress may preempt even such purely local traditional functions, then it is hard to see where there might be an end to what Congress might preempt. It is not an exaggeration to say, as did the dissent in *Garcia*, that the very survival of state and local sovereignty in any meaningful sense is on the line and that the powers of state and local governments are in danger of being reduced to only the trivial roles which Congress allows.

For these reasons, we urge that the Sixth Circuit ruling be *reversed.*

Respectfully submitted,
Kenneth B. Clark, February 19, 2002

Supreme Court, U.S.
FILED
FEB 19 2002
OFFICE OF THE CLERK

No. 01–419

IN THE
Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,
Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF PETITIONERS

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed After Conclusion]

19 pp

QUESTION PRESENTED

Does 49 U.S.C. § 14501(c)(2) of the Interstate Commerce Act preclude the sovereign states from delegating their authority to enact safety regulations regarding local tow-truck operations to political subdivisions such as cities and counties?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE PLAIN LANGUAGE OF SECTION 14501(c)(2)(A) PERMITS THE STATES TO DELEGATE THEIR "SAFETY REGULATORY AUTHORITY . . . WITH RESPECT TO MOTOR VEHICLES" TO POLITICAL SUBDIVISIONS 3

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE STATUTE RAISES SERIOUS CONSTITUTIONAL DOUBTS 6

A. THE COURTS GENERALLY INTERPRET FEDERAL STATUTES TO AVOID SERIOUS CONSTITUTIONAL DOUBTS 6

B. THE CONSTITUTION RESERVES TO THE STATES THE DISCRETION TO DELEGATE THEIR GENERAL POLICE POWER AUTHORITY TO POLITICAL SUBDIVISIONS 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999) 3
Almendarez-Torres v. United States, 523 U.S. 224 (1998) 7
California v. ARC Am. Corp., 490 U.S. 93 (1989) 11
District of Columbia v. *John R. Thompson Co.*, 364 U.S. 100 (1953) 8
Gregory v. Ashcroft, 501 U.S. 452 (1991) 2, 7, 8
Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937) 2, 10
Jones v. United States, 529 U.S. 848 (2000) 2, 7
Mayor v. Educ. Equal. League, 415 U.S. 605 (1974) . 2, 10
Mich. Trucking Ass'n v. Mich. Pub. Serv. Comm'n, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998) 5
Miller v. United States, 78 U.S. 268 (1870) 2, 6
New York v. United States, 505 U.S. 144 (1992) 2, 8
People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *review denied* (May 16, 2001) 3, 5
Pittman v. Chicago Bd. of Educ., 64 F.3d 1098 (7th Cir. 1995) 10
Printz v. United States, 521 U.S. 898 (1997) 2, 8
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) .. 11
Russello v. United States, 464 U.S. 16 (1983) 3
Rust v. Sullivan, 500 U.S. 173 (1991) 7
Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052 (9th Cir. 1987) 5
Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) 6

TABLE OF AUTHORITIES
(continued)

Southeastern Oakland City Res. Recovery Auth. v. City of Madison Heights, 5 F.3d 166 (6th Cir. 1993) 5
United States v. Bass, 404 U.S. 336 (1971) 7
Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 2, 6, 7
Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) 7
Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 2, 4, 6

Constitutional Provisions And Statutes

U.S. Const. amend. X 7
49 U.S.C. § 14501(c) 3
Alaska Const. art. X, § 11 9
Ariz. Const. art. XIII, § 2 9
Cal. Const. art XI, § 7 9
Colo. Const. art. XX, § 6 9
Fla. Const. art. VIII, § 2 9
Haw. Const. art. VIII, § 2 9
Idaho Const. art. XII, § 2 9
Iowa Const. art. III, § 38A 9
Kan. Const. art. 12, § 5 9
La. Const. art. 6, § 5 9
Me. Const. art. VIII, Part 2, § 1 9
Md. Const. art. XI-E, § 3 9
Mass. Const. art. II, § 6 9
Mich. Const. art. VII, § 21 9
Mo. Const. art. 6, § 19 9
Mont. Const. art. XI, § 6 9
Neb. Const. art. XI, § § 2-4 9
N.M. Const. art. X, § 6 9
N.Y. Const. art. IX, § 2 9
N.C. Const. art. VII, § 1 9

TABLE OF AUTHORITIES
(continued)

N.D. Const. art. 7, § 1 9
Ohio Const. art. XVIII, § 3 9
Okla. Const. art. XVIII, § 3A 9
Or. Const. art XI, § 2 9
Pa. Const. art. 9, § 2 9
R.I. Const. art. XIII, § 2 9
S.C. Const. art. VIII, § 17 9
S.D. Const. art. IX, § 2 9
Tenn. Const. art. XI, § 9 9
Tex. Const. art. XI, § 5 9
Utah Const. art. XI, § 5 9
Wash. Const. art. XI, § 11 10
W. Va. Const. art. VI, § 39 10
Wis. Const. art. XI, § 3 10
Wyo. Const. art. 13, § 1. 10
Ala. Code § 11-45-1 9
Conn. Gen. Stat. § 15.2-1102 9
Del. Code. Ann. tit. 22, § 802 9
Ga. Code Ann. § 36-34-1 9
65 Ill. Comp. Stat. Ann. 5/11-1-1 9
Ind. Code § 36-1-3-2 9
Ky. Rev. Stat. Ann. § 82.082 9
Minn. Stat. § 410.04 9
Miss. Code Ann. § 21-17-5 9
Nev. Rev. Stat. Ann. § 266.010 9
N.H. Rev. Stat. Ann. § 31.39 9
N.J. Stat. Ann. § 40:69A-30 9
Vt. Stat. Ann. tit. 24, § 2291 10

INTERESTS OF THE *AMICI*

The States have a substantial interest in the question presented in this case. The Sixth Circuit's decision precludes the States from delegating their general police power authority over public safety on local streets and roads to units of local government which are, by definition, subdivisions of the State.

In practice, all States delegate considerable police power authority to cities, counties, and municipal associations, including responsibility over public safety issues on local streets and roads. All States have constitutional or statutory provisions addressing and providing for such delegations of the States' police power authority. Nothing in the Constitution dictates how the States exercise their reserved police powers, for good reason. Nor should this Court permit federal statutes to dictate such matters to the States.

The States respectfully request that this Court reverse the Sixth Circuit.

STATEMENT OF THE CASE

The *amici* States adopt by reference the petitioners' statement of the case.

SUMMARY OF ARGUMENT

The Sixth Circuit's reading of the statutory phrase "safety regulatory authority of a State" as precluding the States from determining, in their discretion, whether and how to exercise that authority—including the option of delegating to local government units—runs directly contrary to the longstanding assumption that the Constitution reserves to the States precisely such discretion.

In stark contrast to the Sixth Circuit's decision in this case, the Court long has recognized the general rule that a reservation of regulatory authority to the States in a federal statute that might otherwise preempt state regulation "leaves the allocation of regulatory authority to the 'absolute discretion' of States themselves, including the option of

leaving local regulation . . . in the hands of local authorities." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 608 (1991).

A contrary interpretation of section 14501(c)(2)(A) raises "serious constitutional doubts," given that the Court has always interpreted the Constitution as generally precluding the federal government or federal law from dictating the form of and allocation of power within, State governments. *See, e.g., Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Mayor v. Educ. Equal. League,* 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental power"); *see also Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Eliminating the States' discretion to determine whether and how to delegate police power authority to units of local government flies in the face of longstanding tradition and precedent, not to mention state constitutional and statutory provisions in all fifty states, as cited and discussed below.

That result is completely unnecessary and easily avoidable. For over 130 years, the Court has repeatedly invoked the proposition that "when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution." *Miller v. United States*, 78 U.S. 268, 309 (1870).

As it has done in recent cases implicating important state sovereignty concerns, *e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Jones v. United States*, 529 U.S. 848 (2000), the Court should invoke that principle in this case and reverse the Sixth Circuit on purely statutory grounds.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 14501(c)(2)(A) PERMITS THE STATES TO DELEGATE THEIR "SAFETY REGULATORY AUTHORITY . . . WITH RESPECT TO MOTOR VEHICLES" TO POLITICAL SUBDIVISIONS.

As amply demonstrated in petitioners' opening brief, the statutory language at issue here--reserving from preemption "the safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(c)(2)(A)--does not leave the Court with no conclusion other than the one the Sixth Circuit reached here. Indeed, two lower courts have reached a different (and in our view the correct) conclusion. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999); *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *review denied* (May 16, 2001).

It is true that political subdivisions are specifically mentioned in the general preemption provision of the statute, and not in the safety regulatory authority exemption that follows it. And it is further true that there is a canon of construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

But canons of construction are precisely that: "canons," and not absolute rules that override constitutional limitations or other substantial considerations. Indeed, as this Court is well aware, canons of construction can sometimes be in conflict with each other. Mindless adherence to any particular canon may, in a particular case, lead to an unreasonable and unnecessary reading of a statute.

Indeed, if the extremely plain language of § 14501(c)(2)(A) was the only issue here, we probably would not be before the Court in this case. The plain language of that section alone permits only one conclusion here: that the States retain their general police power regulatory authority over motor vehicles and may delegate that authority (or not) as they so choose.

Stripped to its essence, Respondents and the Sixth Circuit ultimately rely *solely* on the *Russello* canon of construction, and nothing more. They simply have no other argument on this point.

In blind reliance on that canon of construction, they would have this Court ignore its own clear decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991), which addressed a similar issue in the context of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). FIFRA expressly permits only "States" to regulate pesticides, but the Court nonetheless held that the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.*

The Court explained in *Mortier*:

> The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" . . . in [its] absolute discretion.'" The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" *because political subdivisions are components of the very entity the statute empowers*.

501 U.S. at 607-08 (emphasis added) (internal citations omitted).

Because *Mortier* concluded that FIFRA permits the States to delegate authority to political subdivisions even though the

federal statute does not expressly mention such local government entities, the Court should reach the same conclusion here (and avoid substantial constitutional questions by so doing). *Cf. People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001) ("Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress."); *Mich. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998) (state can choose to delegate its regulatory authority to a state agency, the Michigan Public Service Commission, rather than having the state legislature enact a statute)

Moreover, interpreting federal statutory references to the "State" to include state agencies and political subdivisions makes sense from a preemption perspective. The United States Code is replete with provisions that purport to preempt "State"—but not "local"—laws. And Congress often does not define the word "State" in such provisions.

Lower courts generally have concluded that such preemption provisions do not preserve local authority, even though the laws refer only to "State" regulation. *See, e.g., Southeastern Oakland City Res. Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 169 (6th Cir. 1993) (rejecting city's argument that the Clean Air Act reserves power to local governments independent of state control); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1064-65 (9th Cir. 1987) (rejecting city's argument that, by naming "State[s]" but not "municipalit[ies]" in the Hazardous Liquid Pipeline Safety Act's preemption provision, Congress intended to preempt State but not municipal regulation).

The Sixth Circuit's approach in this case would suggest just the opposite result, *i.e.*, when Congress uses the word "State" in a preemption provision but fails to include "political subdivisions" or explicitly define "State" to include them, a federal law preempts only the state legislatures (and maybe state agencies) from acting, and not local governments. That result—which it is unnecessary to reach in this case—defies both common sense and the traditional preemption practices of Congress.

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE STATUTE RAISES SERIOUS CONSTITUTIONAL DOUBTS.

A. THE COURTS GENERALLY INTERPRET FEDERAL STATUTES TO AVOID SERIOUS CONSTITUTIONAL DOUBTS.

For at least 130 years, the Court has made clear that "when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution." *Miller v. United States*, 78 U.S. 268, 309 (1870).

In recent years, the Court has recognized that this fundamental principle has particular force with respect to federal statutes that might be interpreted to infringe on state sovereignty interests that the Constitution protects. *E.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (declining to interpret the word "person" in a federal *qui tam* statute to include the States in order to avoid serious Eleventh Amendment questions); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (declining to read the Clean Water Act to authorize a federal agency to assert regulatory jurisdiction over ponds and mudflats because to do so "would result in a significant impingement of the States' traditional and primary power over land and water use"); *Jones v. United States*, 529 U.S. 848, 857 (2000) (declining to interpret the federal arson statute to reach arson that has no significant connection to or impact on interstate commerce and thus involves only "traditionally local criminal conduct").

This fundamental principle serves important constitutional interests by avoiding the unnecessary resolution by the Court of difficult constitutional questions, as well as minimizing interbranch and federal-state conflicts. Indeed, the Court has made clear that the "constitutional doubt" "'canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)).

Similarly, the Court has repeatedly emphasized that this principle complements another fundamental interpretive rule: "that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" *Stevens*, 529 U.S. at 787 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989), and citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *United States v. Bass*, 404 U.S. 336 (1971)).

B. THE CONSTITUTION RESERVES TO THE STATES THE DISCRETION TO DELEGATE THEIR GENERAL POLICE POWER AUTHORITY TO POLITICAL SUBDIVISIONS.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Court has recognized that this Amendment represents a fundamental proposition of our Constitution, and that the federal government does not have unlimited or general police power authority. The federal government has no constitutional

authority to direct the States to act in a governmental capacity—such as by requiring the states to pass legislation. *New York v. United States*, 505 U.S. 144 (1992). Nor can the federal government conscript state officials to implement and enforce federal law, *Printz v. United States*, 521 U.S. 898 (1997), or determine by federal law the necessary qualifications of state government officials. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

The intrusion on state sovereignty and prerogatives in this case is no less threatening to the operation of state government than the federal actions the Court has invalidated in the cases cited above. Indeed, the Sixth Circuit's interpretation of section 14501(c)(2)(A) may have an even greater detrimental effect on state government than the federal requirements the Court struck down in *Ashcroft, New York* and *Printz*.

As a practical matter, state government could hardly function without the ability to engage in significant delegation of state police power authority to units of local government and state agencies. A rule that would require the state legislature to be the *sole* implementer of all laws and policies within a state would be a dramatic and unwarranted change in American democracy.

It is indisputable that a municipal corporation is a department of the state. For that reason, the state may "fashion its basic law so as to grant home rule or self-government to its municipal corporations." *District of Columbia v. John R. Thompson Co.*, 364 U.S. 100, 108 (1953).

In doing so, the state may give to its municipalities an authority as broad as the authority the state itself possesses. *District of Columbia*, 364 U.S. at 108 ("the delegated power of municipalities is as broad as the police power of the state, except as may be restricted by terms of the grant or by the state constitution").

Even though state legislatures might in fact decide to pass and implement tow-truck regulations, the legislatures may well lack intimate knowledge of and expertise with local safety issues. The political subdivisions of the State may well be in a better position to address traffic safety and other issues that vary widely in nature and degree from city to city or county to county. Moreover, state legislatures cannot possibly respond to some situations as swiftly as local governments may. That is not to say that a State cannot or should not choose to enact traffic safety rules at the state level, only that it may have good reasons for choosing not to do so.

Thus, by necessity, and as a matter of common sense, *all* states have delegated police power authority to local governments. These delegations vary in scope and definition, but they generally permit local governments the authority to regulate a host of municipal affairs, including traffic safety issues to some extent, except where local regulations would conflict with a state's general law. *See, e.g.,* Ala. Code § 11-45-1; Alaska Const. art. X, § 11; Ariz. Const. art. XIII, § 2; Cal. Const. art XI, § 7; Colo. Const. art. XX, § 6; Conn. Gen. Stat. § 15.2-1102; Del. Code. Ann. tit. 22, § 802; Fla. Const. art. VIII, § 2; Ga. Code Ann. § 36-34-1; Haw. Const. art. VIII, § 2; Idaho Const. art. XII, § 2; 65 Ill. Comp. Stat. Ann. 5/11-1-1; Ind. Code § 36-1-3-2; Iowa Const. art. III, § 38A; Kan. Const. art. 12, § 5; Ky. Rev. Stat. Ann. § 82.082; La. Const. art. 6, § 5; Me. Const. art. VIII, Part 2, § 1; Md. Const. art. XI-E, § 3; Mass. Const. art. II, § 6; Mich. Const. art. VII, § 21; Minn. Stat. § 410.04; Miss. Code Ann. § 21-17-5; Mo. Const. art. 6, § 19; Mont. Const. art. XI, § 6; Neb. Const. art. XI, § § 2-4; Nev. Rev. Stat. Ann. § 266.010; N.H. Rev. Stat. Ann. § 31.39; N.J. Stat. Ann. § 40:69A-30; N.M. Const. art. X, § 6; N.Y. Const. art. IX, § 2; N.C. Const. art. VII, § 1; N.D. Const. art. 7, § 1; Ohio Const. art. XVIII, § 3; Okla. Const. art. XVIII, § 3A; Or. Const. art XI, § 2; Pa. Const. art. 9, § 2; R.I. Const. art. XIII, § 2; S.C. Const. art. VIII, § 17; S.D. Const. art. IX, § 2; Tenn. Const. art. XI, § 9; Tex. Const.

art. XI, § 5; Utah Const. art. XI, § 5; Vt. Stat. Ann. tit. 24, § 2291; Wash. Const. art. XI, § 11; W. Va. Const. art. VI, § 39; Wis. Const. art. XI, § 3; Wyo. Const. art. 13, § 1.

It is beyond question that the Constitution generally does not dictate the form or structure of state and local governments, nor the allocation of state power between those entities. *See, e.g., Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Mayor v. Educ. Equal. League,* 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental power"); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1101 (7th Cir. 1995) (recognizing and citing numerous cases for "the principle that the federal Constitution does not prescribe any particular separation of powers, or other internal structure, of state government").

Nor should federal statutes such as section 14501(c)(2)(A) be permitted to do so. If Congress may dictate whether a state may delegate its reserved police power authority (expressly recognized and protected by the Tenth Amendment), then could Congress tell a state how to structure its court system? Or how many legislators to have? Or what executive departments are permissible? Surely not.

In order to fully respect the States' interests, it is enough in this case for the Court simply to hold that the Sixth Circuit erroneously relied on the *Russello* canon of construction without respecting the "constitutional doubt" principle with which all canons of construction must coexist.

But the Court might also reiterate that a "clear statement" principle operates in this context. Indeed, there should be a strong presumption that any federal statutory reservation (or for that matter, preemption) of police power authority to a "State" or the "States" necessarily includes units of local government. Thus, section 14501(c)(2)(A) can and should be

read to preserve the States' discretion to choose to delegate some of the reserved authority to units of local government or state agencies. Such reservations are not simply to the "state legislatures," unless Congress expressly so declares.

"When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Thus, only a clear congressional directive should override the presumption in favor of leaving to the States the decision whether and how to delegate reserved police powers. And if and when Congress enacts such a clear directive, this Court will then have to confront serious constitutional questions, but not until then. Section 14501(c)(2)(A) is not such a directive.

The consequence of the Sixth Circuit's decision is to force the States to enact safety regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets. In fact, the Sixth Circuit's decision might even be read to preclude state legislatures from delegating to state agencies the power to develop and implement such regulations.

For the reasons discussed above, such results are unnecessary in this case and unwarranted as a matter of constitutional law. As a matter of Federal-State comity and common sense, federal courts should be reluctant to discern a congressional intent to undermine a bedrock principle of traditional State power and governmental practice.

CONCLUSION

The Sixth Circuit's erroneous decision should be reversed.

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER.
State Solicitor
(Counsel of Record)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed Below]

February, 2002

BILL LOCKYER
Attorney General
State of California

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

STEVE CARTER
Attorney General
State of Indiana

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

MIKE MCGRATH
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

ELIOT SPITZER
Attorney General
State of New York

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W. A. DREW EDMONDSON
Attorney General
State of Oklahoma

SHELDON WHITEHOUSE
Attorney General
State of Rhode Island

MARK BARNETT
Attorney General
State of South Dakota

JOHN CORNYN
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

(17)

No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CITY OF DALLAS IN SUPPORT OF PETITIONERS

MADELEINE B. JOHNSON
City Attorney
CHRISTOPHER D. BOWERS*
Assistant City Attorney
City of Dallas
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201-6318
(214) 670-3519

* *Counsel of Record*

Counsel for Amicus

172422

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3/18

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Interest of Amicus	1
Summary of Argument	3
Argument	6
I. The Sixth Circuit's Decision Clearly Misapplies *Medtronic*.	6
A. The Framework of Pre-emption Analysis.	6
B. The Sixth Circuit Misapplied Both *Medtronic* Presumptions.	8
1. Congress' Purpose When Enacting the Safety Exemption Was to Leave State Safety Authority Unaffected.	8
2. Congress' Intent When Enacting the Nonconsensual Rate Exemption Is Not Relevant When Determining Its Intent on the Safety Exemption.	10
3. Regulation of Tow Trucks Falls Within the Historic Police Powers of the States.	11
4. Summary.	16

Contents

		Page
II.	The Sixth Circuit's Decision Deprives Cities of Their Police Power Contrary to the Clear Mandate of *Mortier*.	17
III.	A Reversal of *Ours Garage* Does Not Conflict with *BFP* and *Russello*.	22
Conclusion		25

TABLE OF CITED AUTHORITIES

Page

Cases:

A. J.'s Wrecker Serv., Inc. v. City of Dallas, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D, 1998 WL 185521 (N.D. Tex. April 15, 1998), *abrogated in part by Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028) 2

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999) 16

Arnold v. Cleveland, 616 N.E.2d 163 (Ohio 1993) ... 21

AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928 (W.D. Tex. 1997) .. 20

AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582 (N.D. Tex. 1998) 20

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) ... 12

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 22

Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston, 184 F.3d 88 (1st Cir. 1999) 20

Cited Authorities

Page

California ex rel. Deukmejian v. County of Mendocino, 683 P.2d 1150 (Cal. 1984) 20, 22, 23

California ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870 (Cal. Ct. App. 2001), *review denied*, (Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) 16

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 6, 7

Citizens for a Safer Community v. City of Rochester, 627 N.Y.S.2d 193 (N.Y. Sup. Ct. 1994) 20, 21

City of Chattanooga v. Fanberg, 265 S.W.2d 15 (Tenn. 1954) 12, 13, 14

City of Cincinnati v. Reed, 500 N.E.2d 333 (Ohio Ct. App. 1985) 14

City of Dallas v. Harris, 157 S.W.2d 710 (Tex. Civ. App. – Dallas 1941, writ ref'd 1, 2, 12

City of New York v. United States Dep't of Transp., 715 F.2d 732 (2d Cir. 1983), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984) 21

Cole v. City of Dallas, No. 01-10194 (5th Cir. Nov. 9, 2001), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 7, 2002) 2, 3

Coparr, Ltd. v. City of Boulder, 942 F.2d 724 (10th Cir. 1991) 20

Cited Authorities

Page

Coyle v. Oklahoma, 221 U.S. 559 (1911) 12

Dallas Merchants & Concessionaires Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993) 19

Dilley v. City of Houston, 222 S.W.2d 992 (Tex. 1949) 19

English v. General Elec. Co., 496 U.S. 72 (1990) ... 7

Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48 (2d Cir. 1988) 20

Fireman's Fund Ins. Co. v. Lodi, 271 F.3d 911 (9th Cir. 2001) 20

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 18

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 6

Ford v. United States, 273 U.S. 593 (1927) 23, 24

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) ... 6

Hempstead T–W. Corp. v. Town of Hempstead, 177 N.Y.S.2d 445 (N.Y. Sup. Ct. 1958), *aff'd*, 179 N.Y.S.2d 848 (N.Y. App. Div. 1958) 12

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 23

Cited Authorities

	Page
Interstate Towing Ass'n, Inc. v. City of Cincinnati, 6 F.3d 1154 (6th Cir. 1993)	12
Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986)	21
Johnson v. Southern Pac. Co., 196 U.S. 1 (1904)	23
Lemon v. Kurtzman, 411 U.S. 192 (1973)	15
Librizzi v. Plunkett, 16 A.2d 280 (N.J. 1940)	12
L-M-S Inc. v. Blackwell, 233 S.W.2d 286 (Tex. 1950)	19
Medtronic v. Lohr, 518 U.S. 470 (1996)	6, 7, 8, 12, 15, 16
Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926)	12
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)	6
National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270 (2d Cir. 1982)	21
National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967)	11
New York v. United States, 505 U.S. 1041 (1992)	12
O'Gilvie v. United States, 519 U.S. 79 (1996)	11

Cited Authorities

	Page
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001)	3, 8, 11, 15, 17, 21, 22
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	14
Porter v. City of Atlanta, 384 S.E.2d 631 (Ga. 1989)	16
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999)	3, 4, 8, 11, 15, 17, 21, 22
Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978)	13
Regional Rail Reorg. Act Cases, 419 U.S. 102 (1974)	11
Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96 (1963)	7
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	7
Russello v. United States, 464 U.S. 16 (1983)	22
Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943)	23
Stephenson v. Binford, 287 U.S. 251 (1932)	13
Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001)	3, 4, 8, 11, 15, 17, 21, 22

Cited Authorities

Page

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001) 3, 4, 8, 11, 15, 22

Town of Ascarate v. Villalobos, 223 S.W.2d 945 (Tex. 1949) 19

United States v. Castro, 837 F.2d 441 (11th Cir. 1988) 23, 24

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 4, 5, 6, 13, 17, 18, 19, 20, 21, 22

Constitutional Provisions:

Ohio Const. art. XVIII, § 3 13

Tex. Const. art. XI, § 5 19

U.S. Const. amend. II 21

U.S. Const. art. VI, cl. 2 6

Federal Statutes:

7 U.S.C. § 136(a)(a) 18

7 U.S.C. § 136v 18

10 U.S.C. §§ 4307-4311, *repealed by* Defense Authorization Act of 1996, P.L. 104-106, § 1624, 110 Stat. 186, 522 (1996) 21

Cited Authorities

Page

29 U.S.C. § 667 20

42 U.S.C. §§ 9601-9675 20

47 U.S.C. § 151 *et seq.* 20

49 U.S.C. §§ 5101-5127 21

49 U.S.C. § 5112 21

49 U.S.C. § 5125 21

49 U.S.C. § 14501 16

49 U.S.C. § 14501(c) 3, 4, 5, 17, 24, 25

49 U.S.C. § 14501(c)(2)(A) 17, 21

49 U.S.C. § 14501(c)(2)(C) 17

Pub. L. No. 103-305, § 601(c), 108 Stat. 1569 (1994) 8

Pub. L. No. 104-88, 109 Stat. 803 (1995) 10

Page

State Statutes:

Cal. Veh. Code § 21100(g) 15

Cal. Veh. Code § 22850.5 15

La. Rev. Stat. Ann. § 32:1714(2) 15

N.Y. Veh. & Traf. Law § 1642(a)(15) 15

Ohio Rev. Code Ann. § 715.22 13

Ohio Rev. Code Ann. § 723.01 13

Ohio Rev. Code Ann. § 4921.02(A)(8) 14

Ohio Rev. Code Ann. § 4923.02(A)(10) 14

Special Act of April 13, 1907, 30th Leg., 1st C.S., ch. 71, 1907 Tex. Spec. Laws 568 19

Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(21) .. 19

Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(25) .. 19

Tex. Code Crim. Proc. Ann. art. 45.019 18

Tex. Code Crim. Proc. Ann. art. 45.201 18

Tex. Loc. Gov't Code Ann. § 51.072 19

Page

Other Authorities:

H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715 .. 9, 10

H.R. Rep. No. 311, 104th Cong., 1st Sess. (1995), *reprinted in* 1995 U.S.C.C.A.N. 793 10

The Federalist No. 17 (Alexander Hamilton) (J. Cooke ed. 1961) 14

The Federalist No. 46 (James Madison) (J. Cooke ed. 1961) 14

INTEREST OF AMICUS

The City of Dallas ("City") has a population of almost 1.2 million, which makes it the eighth largest city in the United States. For more than 60 years, predatory practices by some members of the vehicle towing industry have endangered public safety in the City. *See City of Dallas v. Harris*, 157 S.W.2d 710 (Tex. Civ. App. – Dallas 1941, writ ref'd). In *Harris*, the court described a few of the dangers connected with the towing industry in Dallas:

> It is further shown by testimony that wrecking and ambulance companies, as well as other ambulance chasers, have their places of business and tow-cars equipped with radio sets capable of receiving the short wave police broadcasts, thereby intercepting the City police's radio communications relative to automobile accidents. They then cause their solicitors to race to the scene of the accident in the hope of securing the business of towing the disabled automobiles for repairs. They solicit at the scene of the accident, and on the street and sidewalks, patronage of the persons involved; and ofttimes, encountering lively competition in securing possession of the wrecked automobiles, engage in breaches of the peace among themselves, thereby, in many instances, interfering with police investigation in obtaining information concerning the cause of and blame for the wreck. It also came to the notice of the City Council that wrecker operators make a practice of racing to scenes of accidents, in order to be there first to solicit the business; and, in racing, the drivers and operators invariably violate the traffic ordinances of the City and greatly

> interfere with and obstruct traffic, both en route and upon arrival at the scene of the wreck.

Id. at 711.

To protect the public from unsafe towing practices, the City for more than 60 years has required tow truck companies and their drivers to meet specific safety standards before engaging in the business of towing wrecked and disabled motor vehicles. *See A. J.'s Wrecker Serv., Inc. v. City of Dallas*, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D, 1998 WL 185521, at *1 (N.D. Tex. April 15, 1998), *abrogated in part by Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028); *Harris*, 157 S.W.2d at 710-11.

Aside from its general interest in protecting public safety, the City has a direct interest in the Court's determination of the question presented by this case because the City recently filed its own petition for a writ of certiorari on this issue. *See Cole v. City of Dallas*, No. 01-10194 (5th Cir. Nov. 9, 2001) (per curiam) (unpublished), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 7, 2002) (No. 01-___).

In that case, Peter T. Cole ("Cole") applied to the City for a wrecker driver's permit in early 2000. The City denied his application because he was disqualified under Chapter 48A of the Dallas City Code. Chapter 48A governs nonconsensual towing of motor vehicles from private property. It includes licensing, signage, reporting, inspection, vehicle, equipment, insurance, and rate requirements. Chapter 48A specifically prohibits a person from receiving a wrecker driver's permit if he or she has been convicted of violating the Texas Controlled Substances Act, or a comparable law, that is punishable as a felony, and fewer than five years have

elapsed since the date of release from confinement for the conviction. Cole was disqualified because he had been confined for delivery of a controlled substance (cocaine), a felony, within five years of the date he submitted his application.

In response, Cole sued the City, asserting that Chapter 48A of the Dallas City Code was pre-empted by 49 U.S.C. § 14501(c). The U.S. District Court for the Northern District of Texas denied Cole's request for a preliminary injunction and entered judgment against him. Cole appealed to the Fifth Circuit. While Cole's appeal was pending, the Fifth Circuit issued its opinion in a towing regulation pre-emption case. *See Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028). The *Stucky* court acknowledged "the closeness of the issue and the soundness of the arguments on either side" of "this difficult [pre-emption] issue," but concluded that 49 U.S.C. § 14501(c) pre-empted San Antonio's tow truck ordinance. *Id.*, 260 F.3d at 440, 446. Based on *Stucky*, the Fifth Circuit then vacated the district court's judgment in *Cole* and remanded it to that court. On February 7, 2002, the City timely filed its petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Four circuits, including the Sixth, have held that 49 U.S.C. § 14501(c) pre-empts municipal regulation of tow trucks. *See Stucky*, 260 F.3d 424; *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). All four circuits found that their interpretations were consistent with the goal of the Interstate Commerce

Commission Termination Act ("ICC Termination Act"), which was to increase competition among motor carriers by eliminating burdensome state and local laws. *See Stucky*, F.3d at 444-46; *Petrey*, 246 F.3d at 563; *Tocher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 546. Furthermore, three of those circuits, including the Sixth, did not believe that this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), required it to interpret "State" to include a State's political subdivisions in all circumstances because the law at issue in *Mortier* was different than Section 14501(c). *See Stucky*, F.3d at 443; *Petrey*, 246 F.3d at 561-62; *Mayer*, 153 F.3d at 546-47. In addition, all four circuits have relied on "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Mayer*, 153 F.3d at 545; *see also Stucky*, F.3d at 440-41; *Petrey*, 246 F.3d at 561; *Tocher*, 219 F.3d at 1051.

As is shown below, these four circuits have wrongly decided this issue. To reach their decisions, these circuits did not correctly ascertain Congress' purpose when enacting the pre-emption provision and the exception at issue. Although the goal of the ICC Termination Act was to increase competition by eliminating state and local laws, that Act enacted neither the pre-emption provision relied upon by Ours Garage, nor the safety exemption relied upon by the City of Columbus. Instead, the Federal Aviation Administration Authorization Act of 1994 ("FAA Authorization Act") promulgated both the pre-emption provision and the safety exception at issue. The legislative history of that Act clearly establishes that Congress' intent was to eliminate disparate *economic* regulation, not local safety regulations. Additionally, the legislative history contained in the ICC Termination Act is entitled to little, if any, weight when determining the legislative intent of the

FAA Authorization Act. Furthermore, the four circuits did not presume that the States' historic police power to regulate the towing industry was not to be superseded unless Congress plainly intended to do so.

Moreover, these four circuits have ignored the clear command of *Mortier*. In *Mortier*, this Court expressly found that the term "State" is not "self-limiting." Both before and after *Mortier*, numerous courts, including this Court, have construed "State" in a pre-emption provision (and in other contexts) to include cities.

Finally, these circuits have wrongly relied on the maxim that "the expression of one thing is the exclusion of another." This maxim has force only if the provisions in question were included within the same legislative enactment. In this case, they were not. In addition, a court should not apply this maxim to exclude agents of a party included in a statute. Moreover, this maxim is subordinate to legislative intent. Here, the legislative history of the FAA Authorization Act clearly shows that Congress did not intend to eliminate municipal safety regulation when enacting that law. Perhaps for these reasons, this Court has warned lower courts several times about the dangers of blindly using this maxim.

As the Sixth Circuit has unmistakably erred in holding that Section 14501(c) pre-empts cities from regulating tow truck operations, this Court must correct that error.

ARGUMENT

I. The Sixth Circuit's Decision Clearly Misapplies *Medtronic*.

A. The Framework of Pre-emption Analysis.

The Supremacy Clause of the United States Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, state laws are pre-empted when they conflict with a federal law, and they must yield to that law. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824). Federal law pre-empts state law under the Supremacy Clause when (1) Congress defines explicitly the extent to which a federal statute pre-empts state law ("express pre-emption"), (2) the state law directly conflicts with the force or purpose of federal law ("conflict pre-emption"), or (3) the federal law occupies a legislative field to such an extent that it is reasonable to infer that Congress left no room for state regulation in that field ("field pre-emption"). *Cipollone*, 505 U.S. at 516. Although a municipal ordinance rather than a state law is at issue in this case, the constitutionality of a municipal ordinance for purposes of the Supremacy Clause is "analyzed in the same way as that of statewide laws." *Mortier*, 501 U.S. at 605.

Pre-emption "'may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990)). On the other hand, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517.

Where a federal statute expressly pre-empts state or local law, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996) (citations omitted). The interpretation of the text is guided by two presumptions about the nature of pre-emption.

First, a court should "'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). This presumption is especially strong in areas such as health and safety measures. *English*, 496 U.S. at 79. This approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

The second presumption is that Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Id.* (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Cipollone*, 505 U.S. at 516. "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S at 485 (citation omitted). The "structure and purpose of the statute as a whole" may also be considered. *Id.* In addition, even with a clear expression of intent to pre-empt state and local regulation, a court must still determine the scope of pre-emption. *Id.*

B. The Sixth Circuit Misapplied Both *Medtronic* Presumptions.

1. Congress' Purpose When Enacting the Safety Exemption Was to Leave State Safety Authority Unaffected.

In *Ours Garage*, the Sixth Circuit relied completely on its decision in *Petrey* when affirming the district court's ruling that the City of Columbus could not regulate consensual towing. *Ours Garage*, 257 F.3d at 507. In turn, the Sixth Circuit found in *Petrey* that the goal of the ICC Termination Act was to increase competition among motor carriers by eliminating burdensome state and local laws. *See Petrey*, 246 F.3d at 563. Similarly, the Fifth, Ninth, and Eleventh Circuits also determined that the legislative history behind the enactment of the ICC Termination Act showed that Congress' purpose was to increase competition by eliminating state and local regulations. *See Stucky*, F.3d at 444-46; *Tocher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 546.

The City does not dispute that Congress generally intended to eliminate state and local regulation when enacting the ICC Termination Act. Nonetheless, the Sixth Circuit's focus on the ICC Termination Act misses the mark because the FAA Authorization Act contains *both* the pre-emption provision relied upon by Ours Garage and the safety exemption relied upon by the City of Columbus. *See* Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606 (1994). The legislative history of the FAA Authorization Act shows that Congress' deregulatory purpose was to eliminate disparate *economic* regulations, not local safety regulations:

> [P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 (emphasis added). Specifically, legislative history demonstrates that Congress' purpose was to free the motor carrier industry from state and local economic regulation and to put that industry on a playing field level with that of the air carrier industry, which Congress had already deregulated by passing the Airline Deregulation Act of 1978. *See id.* at 85, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1759. Thus, Congress intended to eliminate the competitive advantage that air carriers, such as Federal Express, had enjoyed under decisions interpreting the 1978 statute relative to motor carriers, such as United Parcel Service. *Id.*

By contrast, even though state safety regulation is presumably just as "diverse" as state economic regulation, the conference report does *not* say that safety regulation causes any problems. In fact, there is no evidence or congressional finding that municipal safety regulations would interfere with Congress' concern for competitiveness in tow trucking. The legislative history of the FAA Authorization Act indeed shows that state safety regulatory authority (presumably including the authority to delegate) was to be "unaffected" by the pre-emption provision. *See id.* at 84, 85, *reprinted in* 1994 U.S.C.C.A.N. at 1756, 1757 ("State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged, since State regulation

in those areas is not a price, route or service and thus is unaffected."); *see also id.* at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756 ("[N]othing in these new subsections contains a new grant of Federal authority to a State. . . . The intention of the conferees is solely to identify certain areas that are not preempted.").

2. Congress' Intent When Enacting the Nonconsensual Rate Exemption Is Not Relevant When Determining Its Intent on the Safety Exemption.

One year after passing the FAA Authorization Act, Congress enacted the ICC Termination Act. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995). This statute recodified the pre-emption provision in its current form as a part of the Interstate Commerce Act ("ICA"). This statute also added an exception to pre-emption that authorized States and political subdivisions to enforce laws relating to the price of a nonconsensual tow. *See* 109 Stat. at 899. The House report for the ICC Termination Act noted that the added exception to the pre-emption provision "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services." *See* H.R. Rep. No. 311, 104th Cong., 1st Sess. at 120 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 832. Accordingly, the provision was "not intended to permit re-regulation of any other aspect of tow truck operations." *Id.* at 119, *reprinted in* 1995 U.S.C.C.A.N. at 831.

The Fifth, Sixth, Ninth, and Eleventh Circuits' conclusion that Congress intended that Act to prohibit cities from regulating tow trucks except for the rates for nonconsensual tows was based on the comments of an individual legislator before the passage of the ICC Termination Act in 1995 and the Act's conference report.

See Stucky, 260 F.2d at 444 n.24 (statement of Rep. Rahall); *Petrey*, 246 F.3d at 563 (conference report); *Mayer*, 158 F.3d at 544-45 (conference report and statement of Rep. Rahall); *Tocher*, 219 F.3d at 1051 (relying on *Mayer*).

The conference report and the comments are inapposite for at least two reasons. First, the conference report and the comments do not address the safety exception at issue in this case; instead, they were made in connection with the enactment of the "nonconsensual rate" exception to the pre-emption provision in the ICC Termination Act. Second, even if the comments were somehow applicable, they occurred after the enactment of the exception at issue. Post-enactment statements are entitled to little weight. *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967). The same is true for a post-enactment conference report because "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 89 (1996). Thus, the Sixth Circuit erred when it based its decision on the legislative history of the ICC Termination Act because that history was post-enactment to the passage of the FAA Authorization Act.

3. Regulation of Tow Trucks Falls Within the Historic Police Powers of the States.

The issue in this case implicates an important federalism concern.[1] When analyzing the scope of a federal pre-emption

1. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. . . . The allocation of power contained in the Commerce Clause, for example, authorizes

(Cont'd)

provision, this Court for years has recognized that the analysis starts with the assumption that the statute does not supersede the "historic police powers of the States" unless that was "the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485.

The Court has defined the police power "as the authority to provide for the public health, safety, and morals." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). For years, courts have acknowledged that States and their cities may exercise their police power by regulating tow trucks to prevent traffic congestion and attendant dangers. *See, e.g.*, *Librizzi v. Plunkett*, 16 A.2d 280, 281-82 (N.J. 1940); *Hempstead T–W. Corp. v. Town of Hempstead*, 177 N.Y.S.2d 445, 451-52 (N.Y. Sup. Ct. 1958), *aff'd*, 179 N.Y.S.2d 848 (N.Y. App. Div. 1958); *City of Chattanooga v. Fanberg*, 265 S.W.2d 15, 19-20 (Tenn. 1954); *Harris*, 157 S.W.2d at 711-12; *cf. Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1165 (6th Cir. 1993) (noting "municipal regulation of the business of towing is not unusual"). In *Fanberg*, the court specifically noted that States often delegate their power to regulate tow trucks to their cities:

> It seems to us clear under many authorities that the business of carrying or transporting property for hire is a privilege, the licensing, regulation

(Cont'd)

> Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 505 U.S. 1041, 144, 162-66 (1992) (citing *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911)); *see also Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers").

> and control of which is a legislative prerogative. This power to regulate the roads and streets is likewise a legislative prerogative and may be delegated by the Legislature of the State to the cities who in turn may by ordinance regulate control of the use and operation of wreckers or towing cars on its streets.

Id. at 19.

For decades, this Court also has recognized that States may regulate businesses that use streets:

> It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

Stephenson v. Binford, 287 U.S. 251, 256 (1932). In fact, "[I]n no field has [this Court's] deference to state regulation been greater than that of highway safety regulation." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443-44 (1978).

Furthermore, this Court knows that States have traditionally delegated their regulatory authority to their cities. *See, e.g.*, *Mortier*, 501 U.S. at 607-09. In this case, the people of the State of Ohio have granted municipalities general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." *See* Ohio Const. art. XVIII, § 3. In addition, the Ohio Legislature has expressly delegated its power to the City of Columbus to regulate motor

vehicles and the transportation of articles upon its highways. *See* Ohio Rev. Code Ann. §§ 715.22, 723.01 (Baldwin 1994). Most importantly, the Ohio Legislature has specifically exempted tow trucks from state law requirements for motor carriers, thereby allowing cities and other local governments to regulate tow trucks. *See* Ohio Rev. Code Ann. §§ 4921.02(A)(8), 4923.02(A)(10) (Baldwin Supp. 2001); *see also City of Cincinnati v. Reed*, 500 N.E.2d 333, 339 (Ohio Ct. App. 1985) (holding that state law authorized municipal towing ordinance). Based on the State of Ohio's long-standing delegation of its authority to regulate tow trucks, the City of Columbus enacted the laws at issue.

This Court has consistently regarded state regulations concerning public safety on streets and highways as inherently local in nature. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This Court's deference to the historic police power of the States and their cities not only is mandated by the Constitution, but also should result in the best protection of the public:

> The City Fathers of Chattanooga who enacted the Ordinance are presumed to be familiar with the local conditions and the necessity for the regulation of wreckers and towing cars. These legislative and administrative officials of the city are the ones who receive complaints about such things and they are the ones who are in a position to know what should be done to protect the public safety.

Fanberg, 265 S.W.2d at 20; *see also The Federalist* No. 17, at 107 (Alexander Hamilton), No. 46, at 316 (James Madison) (J. Cooke ed. 1961).

Here, Congress did not prescribe how States were to assert their authority when it enacted the FAA Authorization

Act. Congress must have known, however, that virtually all States delegate considerable police powers to their cities, including responsibility for the public's safety on streets and thoroughfares. Nonetheless, Congress, when promulgating the Act, did not explicitly prohibit cities from regulating the public-safety aspects of tow trucks.

Several state legislatures have examined Section 14501 and concluded that they may lawfully delegate their regulatory authority over tow trucks to some or all of their municipalities. *See, e.g.*, Cal. Veh. Code §§ 21100(g), 22850.5 (West 2001) (delegating State of California's regulatory authority over licensing and regulating the operation of tow truck service and tow truck drivers to its municipalities); La. Rev. Stat. Ann. § 32:1714(2) (West 2000) (delegating State of Louisiana's regulatory authority to its municipalities with a population of 450,000 or more); N.Y. Veh. & Traf. Law § 1642(a)(15) (McKinney 1996) (delegating New York State's regulatory authority to its municipalities with a population of more than one million); Tex. Transp. Code Ann. § 643.201(a) (Vernon Supp. 2002) (delegating State of Texas' regulatory authority to its municipalities).

One of the "first principles of constitutional adjudication" is "the basic presumption of the constitutional validity of a duly enacted state . . . law." *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (citation omitted). Here, the Sixth Circuit did not presume that the Ohio statutes delegating regulatory authority to cities were constitutional. Instead, the new pre-emption presumption proposed by the *Mayer*, *Tocher*, *Petrey*, and *Stucky* courts turns the *Medtronic* presumption on its head and would represent a significant

intrusion into the States' abilities to handle matters entrusted to them by Congress.[2]

4. Summary.

As stated above, Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Medtronic*, 518 U.S. at 485. Here, the legislative history of the FAA Authorization Act shows that Congress' deregulatory purpose was to eliminate disparate economic regulations, not local safety regulations. Moreover, the legislative history of the ICC Termination Act is entitled to little, if any, weight when interpreting the FAA Authorization Act.

To the extent that the scope of Congress' purpose may be unclear, this Court should not construe the text of Section 14501 in a way that unnecessarily frustrates the ability of cities to respond to the safety concerns created by local towing companies. A construction allowing deference to local

2. Courts have taken notice of the "great advantage" tow companies have over the owners of towed cars. *California ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 872 (Cal. Ct. App. 2001) (citing *Porter v. City of Atlanta,* 384 S.E.2d 631, 634 (Ga. 1989)), *review denied*, (Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). This advantage can lead to widespread abuses of the public. *Servantes*, 103 Cal. Rptr. 2d at 872-73, 878, 879.

Recognizing the dangers that these abuses may present to public safety as well as inherent dangers presented by tow trucks, the State of Texas has left much of the field of tow truck regulation to its municipalities, presumably believing that it could lawfully do so. If this Court were to hold that States cannot delegate such authority, then this precedent would hamper the States in their efforts to protect public safety. This is not sound public policy. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 776 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999) (finding its holding consistent with public policy).

responsibility and expertise would be consistent with the presumption against pre-emption of state and local regulations. *Id.*

II. The Sixth Circuit's Decision Deprives Cities of Their Police Power Contrary to the Clear Mandate of *Mortier*.

In *Petrey*, the Sixth Circuit found that, because the law at issue in *Mortier* differed from Section 14501(c), *Mortier* did not always require the term "State" in a statute to include a State's political subdivisions. *See Petrey*, 246 F.3d at 561-62; *see also Stucky*, F.3d at 443; *Mayer*, 153 F.3d at 546-47.

On its face, Section 14501(c)(2)(A) excepts only "State" regulatory authority concerning safety and insurance.[3] For purposes of the ICA, "State" means "the 50 States of the United States and the District of Columbia." 49 U.S.C. § 13102(18). By contrast, Section 14501(c)(2)(C) allows a State and its political subdivisions to regulate the prices of nonconsensual tows.

Although Subsection (c)(2)(A) expressly refers only to "State" regulatory authority, that does not mean that this subsection does not also allow municipal regulation. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), although explicitly permitting only "a State" to regulate pesticides subject to certain federal restrictions, and defining "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa," does not limit a State's power to redelegate its authority to a political subdivision. *Mortier*, 501 U.S. at 607-09, 611-12.

3. Even though Congress failed to mention municipal safety regulation in this section, it did not explicitly pre-empt municipal safety regulation. Had Congress intended not to except municipal safety regulations, Congress could have said so.

The statute at issue in *Mortier* provided:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

Nonetheless, this Court found the language of Sections 136(aa) and 136v to be "wholly inadequate to convey an express preemptive intent." *Mortier*, 501 U.S. at 607. "Mere silence" would not "suffice to establish 'a clear and manifest purpose' to pre-empt local authority." *Id.*; *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (pre-emption of regulation enacted pursuant to police power will not occur "in the absence of an unambiguous congressional mandate to that effect"). The Court also observed the well-established rule that units of local government are created to exercise such powers as a State may entrust to them in its absolute discretion. *Mortier*, 501 U.S. at 607-08. Consequently, "the exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because *political subdivisions are components of the very entity the statute empowers.*"[4] *Id.* at 608 (emphasis added). In other

4. For example, the City is an integral component of the State of Texas. Municipal ordinances *are* state law and are prosecuted "In the name and by the authority of the State of Texas." Tex. Code Crim. Proc. Ann. art. 45.019 (Vernon Supp. 2002); *see also* Tex. Code Crim. Proc. Ann. art. 45.201 (Vernon Supp. 2002) (authorizing city attorney to represent the State in prosecutions in municipal (Cont'd)

words, the term "State" is not "self-limiting." *Mortier*, 501 U.S. at 612. To the contrary, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the '*absolute discretion*' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."

(Cont'd)
courts). Moreover, under the Texas Constitution, the City is a home-rule municipality. *See* Special Act of April 13, 1907, 30th Leg., 1st C.S., ch. 71, 1907 Tex. Spec. Laws 568; Tex. Const. art. XI, § 5; *see also Dallas Merchants & Concessionaires Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). The Texas Local Government Code provides that a home-rule municipality has the full power of local self-government. Tex. Loc. Gov't Code Ann. § 51.072 (Vernon 1999). Accordingly, "[h]ome-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *Dallas Merchants*, 852 S.W.2d at 490-91.

"Cities occupy an important place in our system of government. In many instances they have been created as arms of the State government, with authority to help protect and maintain the general welfare of the public." *L-M-S Inc. v. Blackwell*, 233 S.W.2d 286, 288 (Tex. 1950). When a home-rule city conducts a governmental activity or function, it is operating as an arm or agent of the State. *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949).

The regulation of tow trucks in Texas is beyond doubt a governmental function. The Texas Legislature has expressly delegated its power to the City to regulate tow truck operations: "[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law." Tex. Transp. Code Ann. § 643.201(a). Furthermore, the Texas Tort Claims Act recognizes "regulation of traffic" and "parking facilities" as governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(21), (25) (Vernon Supp. 2002); *see also Town of Ascarate v. Villalobos*, 223 S.W.2d 945, 950 (Tex. 1949) ("A municipal corporation is considered an arm of the State, and has the police power to protect the safety of the public, and in the exercise of its police power to protect the public from traffic hazards").

Id. at 608 (emphasis added). Thus, the express delegation of regulatory authority to a State may well mean that it is permitted to redelegate its authority to a "political subdivision[] either specifically or by leaving undisturbed . . . existing statutes that would otherwise provide [a] local government with ample authority to regulate." *Id.* at 612.[5]

5. Since 1991, several lower courts have applied *Mortier* to hold that federal statutes allowing a "State" to regulate also authorize its political subdivisions to do so. *See Fireman's Fund Ins. Co. v. Lodi*, 271 F.3d 911, 932-36 (9th Cir. 2001) (holding that the term "State" in pre-emption provisions in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, does not prohibit municipalities from enacting hazardous waste regulations); *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (holding that pre-emption provision of Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, does not prohibit States from delegating their powers under the Act); *Coparr, Ltd. v. City of Boulder*, 942 F.2d 724, 726 (10th Cir. 1991) (holding that FIFRA does not prohibit States from authorizing municipalities to impose notification requirements concerning pesticide use on private individuals, property owners, and the general public); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) (holding that Telecommunications Act of 1996 does not prohibit States from re-delegating their powers under the Act); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 939-40 (W.D. Tex. 1997) (citing *Mortier* for proposition that "State's authority to regulate under a federal statute necessarily includes the authority to delegate local regulation, including regulation for public health, safety, and welfare purposes, to local authorities"); *cf. Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that the term "State" in pre-emption provision of Occupational Safety and Health Act of 1970, 29 U.S.C. § 667, does not prohibit cities from enacting laws to protect public from asbestos removal); *California ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1159-60 (Cal. 1984) (holding FIFRA does not preclude States from authorizing local governments to enact restrictive pesticide regulations); *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193, 200-01 (Cont'd)

Other regulatory exceptions listed in Subsection (c)(2)(A) confirm the conclusion that Congress' use of the term "a State" is not limiting. One example is the exception allowing "a State to impose highway route controls or limitations based on . . . the hazardous nature of the cargo" refers to the HMTA Act. *See* 49 U.S.C. §§ 5101-5127. The HMTA Act's structure allows a city to exercise authority over the routing of hazardous materials shipments by a motor carrier if it complies with the standards prescribed by the Act and the Secretary of Transportation. *See* 49 U.S.C. §§ 5112, 5125; *see also Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112-13 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *City of New York v. United States Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984); *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

Notwithstanding this weight of authority, the Fifth, Sixth, and Eleventh Circuits all explicitly refused to apply *Mortier* to Section 14501(c). *See Stucky*, 260 F.3d at 443; *Petrey*, 246 F.3d at 561-62; *Mayer*, 153 F.3d at 546-47.

(Cont'd)
(N.Y. Sup. Ct. 1994) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program, 10 U.S.C. §§ 4307-4311, *repealed by* Defense Authorization Act of 1996, P.L. 104-106, § 1624, 110 Stat. 186, 522 (1996), did not pre-empt city ordinance that restricted possession of automatic and semiautomatic weapons); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program did not pre-empt city ordinance prohibiting possession and sale of "assault weapons").

III. A Reversal of *Ours Garage* Does Not Conflict with *BFP* and *Russello*.

Despite the clear command of *Mortier*, the Sixth Circuit as well as the Fifth, Ninth and Eleventh Circuits followed "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Stucky*, 260 F.3d at 440-41 (relying on *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Petrey*, 246 F.3d at 561 (relying on *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994), and *Russello*); *Tocher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 545 (relying on *BFP* and *Russello*). This is simply another way of stating the maxim "*expressio unius est exclusio alterius,*" which means "the expression of one thing is the exclusion of another."

This maxim should not be applied to the FAA Authorization Act for several reasons. First, *Russello* itself counsels that this presumption has force only if the provisions in question are included within the same legislative enactment: "'[W]here Congress includes particular language in one section of a statute but omits it in *another section of the same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23 (citation omitted; brackets original; emphasis added). Here, the two exceptions to pre-emption were passed in two different acts.

Second, this maxim should not be applied to exclude agents of a party included in a statute. Seven years before *Mortier*, the California Supreme Court examined whether FIFRA, a statute that authorized "State" regulation of pesticides, precluded States from authorizing local governments to enact such regulations. *See County of*

Mendocino, 683 P.2d 1150. Some plaintiffs relied upon this maxim, claiming that the reference to "State" should be read as excluding local governmental regulation. That court rejected the application of the maxim for two reasons:

> Because local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party. Moreover, even if the maxim were applicable, it would only warrant the conclusion that the statute did not authorize regulation; it would not establish that local regulation was prohibited.

Id. at 1160.

Third, this maxim is subordinate to legislative intent or policy. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943)

> However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Ford, 273 U.S. at 611; *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 15 (1904). Fourth, this maxim is only an aid to statutory construction and not a rule of law. *United States v.*

Castro, 837 F.2d 441, 443 n.2 (11th Cir. 1988). Accordingly, the maxim should be used with care. *See Castro*, 837 F.2d at 443 n.2. Perhaps for these reasons, this Court has quoted Lord Justice Lopes' warning about using this maxim:

> It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The "exclusio" is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

Ford v. United States, 273 U.S. 593, 611-12 (1927).

Here, the legislative history of the FAA Authorization Act shows that Congress' purpose was to eliminate disparate economic regulations, not local safety laws. Furthermore, the legislative history of the ICC Termination Act is entitled to little, if any, weight. Therefore, the application of the maxim to Section 14501(c) would lead to an injustice.

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit and hold that 49 U.S.C. § 14501(c) does not pre-empt cities from regulating vehicle towing.

Respectfully submitted,

MADELEINE B. JOHNSON
City Attorney
CHRISTOPHER D. BOWERS*
Assistant City Attorney
City of Dallas
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201-6318
(214) 670-3519

Counsel for Amicus

* *Counsel of Record*

(18)

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

01-419

No. ~~01-419~~

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, ET AL

Petitioners,

v.

OUR GARAGE AND WRECKER SERVICE, INC. ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CITY OF TOLEDO AND THE OHIO MUNICIPAL LEAGUE

Barbara E. Herring
Law Director
James G. Burkhardt
Senior Attorney
City of Toledo
1 Government Center
Suite 2250
Toledo, Ohio 43604

Counsel for Amicus Curiae
The City of Toledo

BARRY M. BYRON
Counsel of Record
John E. Gotherman
Interstate Square Building I
Suite 240
4230 State Route 306
Willoughby, Ohio 44094

Counsel for Amicus Curiae
The Ohio Municipal League

19 pp

TABLE OF CONTENTS

Page

BRIEF OF RIGHT/CONSENT OF THE PARTIES . . 1

QUESTION PRESENTED 1

PARTIES TO THE PROCEEDING 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATUTORY PROVISIONS 2

THE OHIO CONSTITUTION 3

STATEMENT OF FACTS AND CASE 3

SUMMARY OF ARGUMENTS 4

Authorities
49 U.S.C. § 14501 4,5
Interstate Commerce Act §14501(c) 4,5
Interstate Commerce Act §14501(c)(2)(A) 4
Unites States Constitution Article I, Section 8 4

ARGUMENT 5

Delegating Regulatory Authority to Political Subdivisions 5

Authorities
49 U.S.C. § 14501(c)(2)(A) 5,6
Ace Auto Body & Towing, LTD. v. City of New York, 171 F.3d 765, 775-76 (2d Cir. 1999) 5,6
Hott v. City of Sān Jose, 92 F. Supp. 2d 996, 999-1000 (N.D. Cal. 2000) 5
New Orleans Towing Assoc. v. City of New Orleans, No. Civ. A. 99-3131, 2000 WL 193071, at *8-11 (E.D.La. Feb. 15, 2000) 5
AJ's *Wrecker Serv., Inc. v. City of Dallas*, Nos. 97-1311D, 97-2398D, 1998 WL 185521, at *3 (N.D. Tex. April 15, 1998) 5,6
Harris County Wrecker Owners for Equal Opportunity v. City of Houston, 943 F. Supp. 711, 726-27 (S.D. Tex. 1996) 6
Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607-09, 611-12, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) 6
Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)) 6
Petrey v. City of Toledo, 246 F.3d 548, 559-60 (6th Cir. 2001) 6
Tocher v. City of Santa Ana, 219 F.3d 1040, 1050-51 (9th Cir. 2000) 6
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 545-48 (11th Cir. 1998) 6
Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 54-55 (2d Cir. 1988) 7

Intrastate Distribution of Police Power: Ohio 7

Authorities
Ohio Constitution Article XVIII, Section 3 7

49 U.S.C. §14501 7
49 U.S. C.§14501(c)(2)(A). 7
Petrey v. City of Toledo, 246 F.3d 548, 560 (6th Cir. 2001) 8
Tocher v. City of Santa Ana, 219 F.3d 1040, 1050-51 (9th Cir. 2000) 8
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 545-48 (11th Cir 1998) 8

The Doctrine of Constitutional Doubt 8

Authorities
Almendarez-Torez v. United States, 523 U.S. 224 at 237-238, 118 S.Ct. 1219 at 1227-1228, 140 L.Ed.2d 350 (1998) 8,9
United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, at 408, 29 S.Ct. 527, at 535, 53 L.Ed. 836 (1909) 9

The Interpretation Riddled with Constitutional Doubt 9

Authorities
United States Constitution Article I, Section 8 10
United States Constitution Tenth Amendment 10
New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) 10,11
City of Chicago v. Atchison, Topeka & Santa Fe Railway Co., 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958) 11

CONCLUSION 12

Authorities
49 U.S.C. § 14501 12

TABLE OF AUTHORITIES

Page

Cases

Ace Auto Body & Towing, LTD. v. City of New York, 171 F.3d 765, 775-76 (2d Cir. 1999) 5,6
AJ's *Wrecker Serv., Inc. v. City of Dallas*, Nos. 97-1311D, 97-2398D, 1998 WL 185521, at *3 (N.D. Tex. April 15, 1998) 5,6
Almendarez-Torez v. United States, 523 U.S. 224 at 237-238, 118 S.Ct. 1219 at 1227-1228, 140 L.Ed.2d 350 (1998) 8,9
City of Chicago v. Atchison, Topeka & Santa Fe Railway Co., 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958) 11
Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 54-55 (2d Cir. 1988) 7
Harris County Wrecker Owners for Equal Opportunity v. City of Houston, 943 F. Supp. 711, 726-27 (S.D. Tex. 1996) 6
Hott v. City of San Jose, 92 F. Supp. 2d 996, 999-1000 (N.D. Cal. 2000) 5
Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)) 6
New Orleans Towing Assoc. v. City of New Orleans, No. Civ. A. 99-3131, 2000 WL 193071, at *8-11 (E.D.La. Feb. 15, 2000) 5
New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) 10,11
Petrey v. City of Toledo, 246 F.3d 548, 559-60 (6th Cir. 2001) 6,8
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 545-48 (11th Cir. 1998) 6,8

Tocher v. City of Santa Ana, 219 F.3d 1040, 1050-51 (9th Cir. 2000) 6,8
United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, at 408, 29 S.Ct. 527, at 535, 53 L.Ed. 836 (1909) 9
Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607-09, 611-12, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) 6

Statutes

49 U.S.C. § 14501 4,5,7,12
49 U.S.C. §14501(c) 4,5
49 U.S.C. § 14501(c)(2)(A) 4,5,6,7

Constitutions

Ohio Constitution Article XVIII, Section 3 7
Unites States Constitution Article I, Section 8 ... 4,10
United States Constitution Tenth Amendment 10

BRIEF OF RIGHT/CONSENT OF THE PARTIES

The City of Toledo does not require the consent of the parties in order to file an *amicus* brief, pursuant Rule 37.4 of the rules of this court. The Ohio Municipal League, *amicus curiae,* received the consent of both parties to participate in this action, pursuant to Rule 37 of the rules of this court. Such consent was filed with this court in the original *Amicus Curiae* Brief in Support of Petition for *Writ of Certiorari* . Additionally, the Ohio Municipal League is composed of municipalities which, by rule, like the City of Toledo, do not require the consent of the parties to file an *amicus* brief.

QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Columbus, (2) the Director of Public Safety for the City, Mitchell Brown, and (3) the License Supervisor of the Public Safety Department for the City, Bobbie Beavers. Respondents are (1) Ours Garage and Wrecker Service, Inc., and (2) the Towing and Recovery Association of Ohio.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506 (6th Cir. 2001), and the district court's opinion (Pet. App. 33-A) is unreported.

JURISDICTION

The court of appeals entered judgment on June 19, 2001. Pet. App. 3-A. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1). This court accepted jurisdiction on January 4, 2002.

CONSTITUTIONAL PROVISIONS

Article I, Section 8 United States Constitution:

"The Congress shall have Power ***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ***"

The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS

49 U.S.C. § 14501(c)(1) and (2) of the Interstate Commerce Act ("ICA") provide:

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—) shall not restrict the safety regulatory authority of a State with respect

to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

THE OHIO CONSTITUTION

Article XVIII, Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

STATEMENT OF FACTS AND CASE

The *amici* incorporate, by reference, the **Statement** of the Petitioner, the City of Columbus.

SUMMARY OF ARGUMENTS

Different Circuit Courts and state courts have interpreted 49 U.S.C. § 14501 in dramatically different ways. In the instant case, the Sixth Circuit Court of Appeals has improperly construed the statute to prevent the City of Columbus from enacting and enforcing reasonable highway safety regulations against the respondent.

The *amici curiae*, the City of Toledo, Ohio and the Ohio Municipal League, seek to add their voices in support of the position of the City of Columbus. The Sixth Circuit court of Appeals, and certain other courts, have misinterpreted 49 U.S.C § 14501 because Congress did not intend to interfere with **intra**state distribution of police powers when drafting § 14501(c) of the Interstate Commerce Act. Congress drafted section 14501(c)(2)(A) as a safety exception to preemption under section 14501(c)(1). In section 14501(c)(2)(A), Congress expressly provided section 14501(c)(1) "shall not restrict the safety regulatory authority of a State." Congress remained silent as to "political subdivision[s]" precisely because it did not want to interfere with a **intra**state distribution of police power. States, in accordance with their police power and state law, may or may not delegate safety regulatory authority to political subdivisions.

Pursuant to Article I, Section 8 of the Constitution of the United States, doubt would arise if Congress attempted to prevent political subdivisions from exercising State police power over highway safety, expressly authorized in section 14501(c)(2)(A). Similarly, Congress could not presume to grant police power to political subdivisions if the State's laws were silent on that issue. Thus, Congress was silent on the issue in section 14501(c)(2)(A).

Consequently, 49 U.S.C. § 14501(c) permits cities to enact safety regulations regarding local tow-truck operations if the State's laws delegate such authority to the city.

By ruling as it has, the Sixth Circuit Court of Appeals has subjected 49 U.S.C. § 14501 to "constitutional doubt." The lower court's opinion seems to suggest that Congress has the authority to control the **intra**state distribution of police powers. This interpretation would permit Congress to exercise power which exceeds its Constitutional power to regulate **inter**state commerce, pursuant to Article I, Section 8 of the Constitution, which is contrary to, and in violation of, the Tenth Amendment to the United States Constitution. The *amici* respectfully suggest that the doctrine of "constitutional doubt" should be applied in this matter. The statute, which is susceptible to different interpretations, should **not** be interpreted in a way which implicates a violation of the fundamental principles of federalism. Thus, the interpretation of the statute, which is proposed by the City of Columbus, should be adopted by this court as the law of the land.

ARGUMENT

Delegating Regulatory Authority to Political Subdivisions

Congress did not intend to prevent a State from delegating its safety regulatory authority to a political subdivision under 49 U.S.C. § 14501(c)(2)(A). *Ace Auto Body & Towing, LTD. v. City of New York*, 171 F.3d 765, 775-76 (2d Cir. 1999); *Hott v. City of San* Jose, 92 F. Supp..2d 996, 999-1000 (N.D. Cal. 2000); *New Orleans Towing Assoc. v. City of New Orleans*, No. Civ. A. 99-3131, 2000 WL 193071, at *8-11 (E.D.La. Feb. 15, 2000); AJ's *Wrecker Serv., Inc. v. City of Dallas* , Nos. 97-1311D, 97-2398D, 1998 WL 185521, at *3 (N.D. Tex. April 15, 1998);

Harris County Wrecker Owners for Equal Opportunity v. City of Houston, 943 F. Supp. 711, 726-27 (S.D. Tex. 1996). *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-09, 611-12, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991).

In analyzing the intent of Congress, the courts have traditionally "'start[ed] with the assumption that the historic police powers of the States [are] not to be superceded . . .' unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

It is not disputed among the Circuits that Congress creates an exception to preemption for state safety regulations, under § 14501(c)(2)(A). *Petrey v. City of Toledo*, 246 F.3d 548, 559-60 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000); *Ace* at 772-75; *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11th Cir. 1998). Congress expressly says that it "shall not restrict the safety regulatory authority of a 'State.'" 49 U.S.C. § 14501(c)(2)(A).

The *amici* assert that Congress is silent as to "political subdivisions," in § 14501(c)(2)(A), precisely because Congress does not want to interfere with **intra**state distribution of police power. It is up to the States, not Congress, to distribute safety regulatory authority within the State, if the State's laws so provide.

This contention is supported by the analysis of Second Circuit and by several district courts: "[L]egislative history indicates that state safety regulatory authority (including presumably the authority to delegate) was to be 'unaffected' by the preemption statute." *Ace* at 775-76 (citing *See* H.R. Conf. Rep. No. 103-677, at 84, 85, *reprinted in* 1994

U.S.C.C.A.N. at 1756, 1757; *AJ's Wrecker* at *3; *Harris* at 726-27; *see also Wis. Pub. Intervenor* at 607-09, 611-12 (noting that although FIFRA expressly permits only "States" to regulate pesticides, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities"); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that usage of the term "state" in OSHA preemption provision also encompassed municipalities)).

Intrastate Distribution of Police Power: Ohio

Pursuant to Article XVIII, Section 3 of the Ohio Constitution:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The constitutional grant of authority to the City of Columbus, under the Ohio Constitution, expressly permits the enactment safety regulations regarding tow-truck operations which do not conflict with state laws. This is the exact type of **intra**state distribution of police power that Congress did not intend to prohibit under § 14501(c)(2)(A).

The Sixth Circuit Court of Appeals, and certain other courts, have held the safety regulation exception to preemption provided for in § 14501(c)(2)(A) does not apply to political subdivisions because political subdivisions are

mentioned in § 14501, but not in § 14501(c)(2)(A) specifically. *Petrey v. City of Toledo*, 246 F.3d 548, 560 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11th Cir 1998). These courts reason that Congress acted intentionally in excluding the particular language of "political subdivision[s]," and thus "while states may regulate the safety of motor carriers, political subdivisions may not." *Petrey*, 246 F.3d at 561. *See Tocher*, 219 F.3d at 1051; *R. Mayer*, 158 F.3d at 545.

Even if Congress intentionally omitted the particular language of "political subdivision[s]," this could mean Congress consciously did not wish to interfere with **intra**state distribution of police powers. Congressional silence as to the power of "political subdivision[s]" may well have been used so as not to interfere with a given state's distribution of police power, which may or may not delegate regulatory authority to political subdivisions. In doing so, Congress avoided overstepping its constitutional authority to regulate only **inter**state commerce, not the intrastate distribution of police power.

The Doctrine of Constitutional Doubt

This Court has recently described the doctrine and rationale of "constitutional doubt":

> "As Justice Holmes said long ago: **'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'** *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916) (citing *United States ex rel. Attorney General v. Delaware & Hudson Co.*,

> 213 U.S. 366, 408, 29 S.Ct. 527, 535-536, 53 L.Ed. 836 (1909)); see also *Ashwander v. TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483-484, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). **'This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.'** *Rust v. Sullivan*, 500 U.S. 173, 191, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991); see also *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-307, 44 S.Ct. 336, 337-338, 68 L.Ed. 696 (1924)." (Emphasis added.) *Almendarez-Torez v. United States*, 523 U.S. 224 at 237-238, 118 S.Ct. 1219 at 1227-1228, 140 L.Ed.2d 350 (1998).

The doctrine does not require a finding that the statute is unconstitutional; rather, the inquiry is limited to a determination whether serious constitutional doubt exists as to a viable interpretation of the statute. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, at 408, 29 S.Ct. 527, at 535, 53 L.Ed. 836 (1909).

It is with this framework in mind that the *amici* raise the following argument.

The Interpretation Riddled with Constitutional Doubt

Congress, according to the Sixth Circuit and other courts, has authorized the States to regulate highway safety, but prevented the political subdivisions of states from doing so. By ruling as they have, these courts have held that Congress has the authority to control the **intra**state distribution of police powers. This interpretation grants to Congress power which exceeds its Constitutional power to regulate **inter**state commerce, pursuant to Article I, Section

8 of the Constitution. It is respectfully submitted that such a statute would be contrary to the Tenth Amendment to the United States Constitution.

In *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), this Court considered the federal government's authority to compel individual states to enforce federal regulations. In ruling that Congress lacked the authority to compel the States to enforce federal law, this Court stated:

> "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, **the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.** See *Coyle v. Smith*, 221 U.S. 559, 565, 31 S.Ct. 688, 689, 55 L.Ed. 853 (1911). The Court has been explicit about this distinction. 'Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.' *Lane County v. Oregon*, 7 Wall., at 76." (Emphasis added, and as in original). *Id.*, 505 U.S. 144 at 162, 112 S.Ct. 2408 at 2421, 120 L.Ed.2d 120.

New York, supra, goes on to say:

"We have always understood that even where Congress has the authority under the

Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *E.g., FERC v. Mississippi*, 456 U.S., at 762-766, 102 S.Ct., at 2138-2141; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288-289, 101 S.Ct., at 2366; *Lane County v. Oregon*, 7 Wall., at 76. **The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.**" (Emphasis added.) *Id.*, 505 U.S. 144 at 166, 112 S.Ct. 2408 at 2423.

The position of the *amici* also finds support in language from *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958). While holding that the City of Chicago could not interfere with the mandate of the railroads (as common carriers) to provide transportation between railroad stations in Chicago, the local government retained significant police power:

> "We are fully aware that use of local streets is involved, but no one suggests that Congress cannot require the City to permit interstate commerce to pass over those streets. **Of course the City retains considerable authority to regulate how transfer vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and**

> **other general safety regulations. Similarly the City may require registration of these vehicles and exact reasonable fees for their use of the local streets**. *Cf. Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed. 168; *Capitol Greyhound Lines v. Brice* , 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053." (Emphasis added.) *Id.*, at 88, 78 S.Ct. at 1069-1070.

Implicit in the *Chicago* case is the notion that Congress' authority is limited to the regulation (or, more accurately in this case, the protection) of interstate commerce. To the extent Congress might attempt to limit the distribution of police powers within a state (after permitting the state government to pass such safety regulations), such action would run afoul of the Constitution.

Given that there is an interpretation of the statute which does not raise this grave, constitutional doubt (i.e. silence manifested the intent of Congress to avoid the thicket of the intrastate distribution of police powers), the judgment of the Sixth Circuit Court of Appeals should be reversed, and judgment should be entered on behalf of the City of Columbus.

CONCLUSION

The judgment of the Sixth Circuit should be reversed. 49 U.S.C. § 14501 should be interpreted in such a manner consistent with the intent of Congress and as would avoid constitutional doubt.

Respectfully submitted,

Barbara E. Herring (MH)
Barbara E. Herring
Law Director
James G. Burkhardt
Senior Attorney
City of Toledo
1 Government Center
Suite 2250
Toledo, Ohio 43604

Counsel for Amicus Curiae
The City of Toledo

Barry M. Byron (MH)
Barry M. Byron
Counsel of Record
John E. Gotherman
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303

Counsel for Amicus Curiae
The Ohio Municipal League

Supreme Court, U.S.
FILED
MAR 21 2002
CLERK

(19)

Nos. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE TOWING AND RECOVERY ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENTS

MICHAEL P. MCGOVERN
AYRES & PARKEY
708 South Gay Street
Knoxville, TN 37901
(865) 637-1181

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

36 pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THIS CASE INVOLVES CORE COMMERCE CLAUSE AUTHORITY AND DOES NOT PRESENT ANY SIGNIFICANT TENTH AMENDMENT ISSUES. 7

A. Regulation of Transportation Services Lies at the Heart of Congress' Commerce Clause Authority. 8

B. Tenth Amendment Concerns Are Minimal. 11

II. THE PLAIN LANGUAGE OF SECTION 14501 EXPRESSLY DISTINGUISHES BETWEEN STATE AND LOCAL REGULATORY AUTHORITY 15

III. THE SUPPOSED CONFLICTS GENERATED BY THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 14501 STEM FROM UNWARRANTED ASSUMPTIONS ABOUT THE SCOPE OF PREEMPTION. 23

A. The Sixth Circuit's Preemption Analysis Does Not Conflict with Federal Review Authority Over State and Local Safety Regulations in General. 23

B. Preemption of Local Authority to Enact or Enforce Their Own Laws Does Not Preclude Them from Assisting in the Enforcement of Valid Laws Established at a Higher Level of Government. 26

C. The Remaining Scope of State and Local Preemption Accords with Common Sense in Light of Congress' Free-Market Goals. 29

CONCLUSION 30

TABLE OF AUTHORITIES

Pages

Cases

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 8

American Airlines, Inc. v. *Wolens*, 513 U.S. 219 (1995) 25, 30

Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 13

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 14

Interstate Towing Ass'n v. *City of Cincinnati*, 6 F.3d 1154 (CA6 1993) 2

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 10

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 24, 29

National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 16

New York v. United States, 505 U.S. 144 (1992) 11, 12

Printz v. *United States*, 521 U.S. 898 (1997) 11

R. Mayer of Atlanta, Inc. v. *City of Atlanta*, 158 F.3d 538 (CA11 1998), *cert. denied*, 526 U.S. 1038 (1999) 5

Reno v. *Flores*, 507 U.S. 292 (1993) 8

Reynolds v. *Sims*, 377 U.S. 533 (1964) 14

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 15

Sailors v. *Board of Ed. of Kent Cty.*, 387 U.S. 105 (1967) 14

United States v. *Lopez*, 514 U.S. 549 (1995) 10, 11

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) ..... passim

Statutes

7 U.S.C. § 136v 20, 22
7 U.S.C. § 7756 17
12 U.S.C. § 4122 17
15 U.S.C. § 1203 17
25 U.S.C. § 2806 17
29 U.S.C. § 1144 17
42 U.S.C. § 2000e-7 17
47 U.S.C. § 224 17
49 U.S.C. § 14501 ..... passim

Other Authorities

Consolidation's Effects on Retail Towing, Tow Times, June 1997 4
John Hawkins II, *The World History of the Towing & Recovery Industry* (1989) 1, 2
Memorandum re: Federal Aviation Administration Authorization Act of 1994 (Jan. 1995) 27
Two New Consolidators Enter the Industry, Tow Times, Dec. 1997 2
U.S. Census Bureau, 1997 Census of Governments (1999) 3

INTEREST OF AMICUS CURIAE[1]

Towing and Recovery Association of America ("TRAA") is the national association of motor carriers engaged in the towing and recovery of motor vehicles. TRAA is a federation of fifty state towing and recovery associations and the towing and recovery association of the District of Columbia. TRAA also represents more than 1300 motor carriers nationwide that engage in towing and recovery operations involving every type and size of motor vehicle that is operated on our Nation's highways. The proliferation of repetitive and sometimes conflicting local laws for licensing and regulating towing and recovery services imposes a tremendous burden on TRAA's members and the members of its affiliated associations, and thus this case is of particular interest to TRAA.

STATEMENT

Fifty years ago, the business of automotive towing was ancillary to a primary business such as a gas station or automotive repair garage. John Hawkins II, *The World History of the Towing & Recovery Industry* 278 (1989) ("*History of Towing*"). Tow trucks were purchased and operated by those small businesses as a means to "feed" their automotive repair shops. Then, it was not uncommon for most garages and repair facilities to own their own tow truck. There was, in the vernacular of the industry, "a tow truck on every corner."

Because so many automotive businesses owned one or two tow trucks, in those early days of towing, tow trucks did not range far from their base of operation. A tow truck was never far from the scene of an accident or breakdown.

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus*, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief.

However, the notion that "the towing of vehicles ... is primarily a local service," *Interstate Towing Ass'n* v. *City of Cincinnati*, 6 F.3d 1154, 1163 (CA6 1993), is antiquated and no longer accurate. The past twenty years have witnessed a dramatic evolution of the towing industry from the traditional intra-city "mom and pop" small businesses, ancillary to gas stations or garages, into multi-million dollar transportation companies conducting business in many different jurisdictions. Increased costs of operating tow trucks, including equipment cost, fuel, and insurance have made it financially inefficient for an auto repair business to operate just one or two tow trucks on a part-time basis. Moreover, the emergence of self-service gas stations eliminated many small auto repair businesses along with their tow trucks.

Beginning in the early 1970s, towing increasingly became a specialty business. "Joe's Service Station and Wrecker" has given way to "Joe's 24-Hour Towing Service." A single tow truck parked in front of a local gas station, common 25 years ago, has been replaced with tow truck fleet operations, which service broad areas across multiple jurisdictions. That evolution was highlighted by the simultaneous emergence of specialty trade associations. In 1974, the first national trade organization for the towing industry, Interstate Towing Association, was formed by tow truck companies holding certificates of authority from the Interstate Commerce Commission (ICC). Hawkins, *History of Towing*, at 170. In 1979, Towing and Recovery Association of America ("TRAA"), the first national association for all towing companies, and *amicus* here, was organized. *Id.* at 169.

More recently, the towing industry has been the target of national mergers and consolidations. Within the last ten years, at least four different companies have organized nationwide networks of towing companies. *Two New Consolidators Enter the Industry*, Tow Times, Dec. 1997, at 24. Representative of that trend is United Road Services, Inc. ("URSI"), based in Albany, New York. Beginning in May

1998, URSI has acquired towing companies throughout the United States, operating them under the tradename "United Road Services." Today, the Towing Division of URSI is comprised of 22 towing firms in 16 states. Road One, Inc., another national consolidator of towing firms, operates 62 companies in 24 states.

Without "a tow truck on every corner," tow truck operations have necessarily become multi-jurisdictional, often traveling many miles through numerous jurisdictions in the course of a single tow. It is not unusual for a modern-day tow truck company to pick up vehicles in several different local jurisdictions on a daily basis. In some areas, even a tow truck company operating basically within one metropolitan area will invariably find itself doing business in a number of independent local jurisdictions. For instance, in Cook County, Illinois, there are 121 municipalities and 29 townships. U.S. Census Bureau, 1997 Census of Governments (1999). Nassau County, New York, is comprised of 66 municipalities and 3 townships. *Id.* There are 36 municipalities and 12 townships in the Cincinnati/Hamilton County metropolitan area, and 32 municipalities in the Birmingham/Jefferson County, Alabama, metropolitan area. *Id.*

One of the many examples of such multi-jurisdictional towing companies is the business run by TRAA's treasurer, Charles H. Schmidt, Jr., based in the Village of Roslyn, in the Town of North Hempstead, New York. Mr. Schmidt operates a fleet of eight tow trucks, employs four drivers, and pays license fees in thirteen different jurisdictions totaling over $4000 per year. And even though his base of operations is within ten miles of New York City, Mr. Schmidt elects not to obtain a license to pick up vehicles within the City due to the added cost and burden of New York's licensing program.

Exclusive contracts between towing firms and auto and truck dealerships, auto clubs, and dispatch services, have also served to broaden the range of operation of towing businesses. *Consolidation's Effects on Retail Towing*, Tow

Times, June 1997, at 39. Disabled vehicles, particularly heavy trucks, are regularly retrieved from distant breakdown locations and towed back to their home terminals or dealerships for repair. The towing of vehicles in interstate traffic is commonplace. Similarly, national programs such as Triple-A, OnStar, and auto manufacturer service options regularly contract with towing companies around the nation precisely to provide their customers with convenient and often pre-paid towing services wherever they may encounter problems in their travels.

Furthermore, unlike many common carriers of property (freight), towing companies regularly transport vehicles over varying and unplanned routes that are dictated by the location of the pickup and the desires of the customer. Each tow call may take the tow truck company to a different local jurisdiction to retrieve a disabled or wrecked motor vehicle. And it may likewise take the tower to any number of drop-off destinations, whether near the initial location of the vehicle or across municipal or state lines to the customer's home, place of business, or preferred garage. It is impractical, if not impossible, for a tow truck company to anticipate with any degree of certainty the location to which it will be dispatched and to which it will deliver the vehicle.

Because many local jurisdictions, like the City of Columbus, Ohio, have enacted ordinances requiring licensure *prior to* conducting towing operations within the jurisdiction, the average modern, mobile, tow truck business daily is exposed to potential licensure and regulation by dozens of localities and, on an annual basis, by perhaps hundreds of local entities. Such local regulation applies to *both* resident and non-resident towing companies that pick up within the locality.

The City of Columbus towing ordinance serves as a good example. Section 549.02 of the Ordinance provides that, other than when the vehicle being towed "has been picked up outside the City," no tow truck owner "shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid tow truck owner's license obtained pursuant to this chapter has been issued and is in force for that tow truck." Pet. App. 37-A to 38-A. The tow truck *driver* also is required to obtain and hold a separate license prior to towing within the City. Under the Columbus towing ordinance, therefore, a tow truck and driver traveling from Detroit, Michigan, to within the city limits of Columbus to retrieve a disabled vehicle for a Detroit customer must obtain a tow truck permit from the City prior to retrieving that vehicle. Similar restrictions exist in hundreds of municipalities throughout the nation and are the bases of the "patchwork of local ordinances" referred to in *R. Mayer of Atlanta, Inc.* v. *City of Atlanta*, 158 F.3d 538, 546 (CA11 1998), *cert. denied*, 526 U.S. 1038 (1999).[2]

The business of automotive towing has evolved from a local activity secondary to a garage or gas station into a multi-jurisdictional transportation industry. Absent preemption of local regulation, that industry will be subject to a burdensome and varied array of local licensing requirements and regulations to the detriment of Congress' vision of a fluid national market for motor carriage services.

SUMMARY OF ARGUMENT

1. Exercising its core authority under the Commerce Clause, Congress has preempted virtually all state and local regulation related to the price, route, and service of motor carriers of property. That preemption was necessary to fulfill Congress' intent to provide a free market in the provision of such transportation services and to eliminate the vices of a multiplicity of state and local regulations. Recognizing, however, that certain motor vehicle safety regulations would also relate to price, route, or service, Congress provided a limited

---

[2] Some localities go even further, and also require license for towing companies that merely drop off vehicles within the jurisdiction, regardless of the pick-up location.

exemption for such regulation by the States themselves, though not for such regulation by localities. That limited mitigation of its preemptive command again was in keeping with Congress' overall deregulatory intent, and served to channel through a limited number of decision makers any safety regulations that overlapped with the otherwise preempted field of price, route, or service. Such preemption and purposely limited authorization operate directly to free up the channels and instrumentalities of interstate commerce and to free up commercial activities that substantially affect interstate commerce. They are thus well within Congress' commerce authority and raise no significant constitutional doubts.

Having declared the field of price, route, or service of motor carriers to be of uniquely federal interest, Congress was not obliged to allow state or local regulation within that field at all. Its decision to allow some limited regulation if, and only if, generated by the States themselves, does not limit state authority, but rather gives States more authority than they otherwise had under the preemption clause. That partial allowance of authority within a federal field does not in any way raise Tenth Amendment concerns.

2. The language Congress adopted in § 14501 fully reflects its clear intent to preempt the field relating to price, route, or service of motor carriers, and its limited allowance of certain state motor vehicle safety authority that impinged upon the preempted field. Throughout the entire section the language makes a clear distinction between the States and political subdivisions of States, both in its preemptive subsections and in its subsections preserving certain authority, sometimes to States alone, and sometimes to their political subdivisions as well. Given the level of specificity in § 14501, the interpretation of the word "State" as used in the far less informative statute in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), simply does not apply.

3. The Sixth Circuit's correct interpretation of the safety exemption to apply only to State, and not local, regulation

does not conflict with other statutes regarding federal review of safety regulations and does not lead to any absurd results. The suggestions to the contrary are based upon unwarranted assumptions about the substantive scope of both the preemption clause and the safety exemption. While the substantive scope issues are not before the Court in this Case, and should not be resolved here, merely recognizing the parameters of the scope issues demonstrates that the alleged conflicts and absurdities are red-herrings. Because not all motor vehicle safety regulations will "relate to" a motor carrier's price, route, or service, localities will retain authority over matters such as general speed limits and traffic signage and the federal government will continue to review such non-preempted regulations regardless of local exclusion from the motor vehicle safety exemption. And as for safety regulations that *do* "relate to" price, route, or service, or regulations that do *not* involve motor vehicle safety, their preemption is perfectly reasonable and in accord with Congress' intent.

ARGUMENT

I. THIS CASE INVOLVES CORE COMMERCE CLAUSE AUTHORITY AND DOES NOT PRESENT ANY SIGNIFICANT TENTH AMENDMENT ISSUES.

Notwithstanding general considerations of comity and a reasonable caution against finding a casual or inadvertent preemption of state law, this case presents no serious doubts about Congress' constitutional authority to preempt state and local laws related to the price, route, and service of motor carriers. Indeed, petitioners do not contend otherwise. The doctrine of constitutional doubt that comes into play when Congress pushes the boundaries of its authority thus has no role whatsoever in this case.

While the doctrine of constitutional doubt "seeks in part to minimize disagreement between the branches by preserv-

ing congressional enactments that might otherwise founder on constitutional objections," the overzealous invocation of that doctrine would actually "aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). As this Court has recognized, the "'constitutional doubts' argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid *serious* constitutional doubts, * * * not to eliminate all possible contentions that the statute *might* be unconstitutional." *Reno* v. *Flores*, 507 U.S. 292, 314 n. 9 (1993) (emphasis in original; citation omitted); *see also Almendarez-Torres*, 523 U.S. at 238 (doctrine requires "a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made").[3]

Given the absence of any serious constitutional issue in this case, therefore, the question for this Court is wholly one of ordinary statutory construction without resort to the doctrine of constitutional doubt.

A. Regulation of Transportation Services Lies at the Heart of Congress' Commerce Clause Authority.

The statutory provision underlying this case is 49 U.S.C. § 14501(c)(1), which expressly preempts state and local regulation related to price, route, or service of any motor carrier

---

[3] And even colorable constitutional claims do not require application of the doctrine of constitutional doubt . The "doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." *Almendarez-Torres*, 523 U.S. at 239. "[W]here a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt" a statute's constitutionality, "precedent makes clear that the Court need not apply" the doctrine *Id.*

with respect to the transportation of property. That statute falls squarely within Congress' well-established Commerce Clause authority. While various *amici* breathlessly decry perceived Commerce Clause and Tenth Amendment violations from such preemption, the parties themselves make no such claims, and the United States – by asserting that even broader preemptive authority lies with the Secretary of Transportation – plainly rejects such contentions. *See* U.S. Br. at 16 n. 2 ("Congress possesses *power* to preempt municipal regulation without preempting state-level regulation") (emphasis in original). And as to the specific issue in this case – whether Congress' exemption for state motor vehicle safety regulatory authority that would otherwise relate to price, route, or service necessarily exempts restrictions imposed by political subdivisions – the parties likewise make no suggestion that a local exemption is in any way *required* by the Commerce Clause.

That motor carriers of property, as a class, are regularly engaged in interstate commerce is beyond dispute. Towing services as part of that class are just as clearly involved in interstate commerce on a regular and increasing basis. This stems not only from interstate tows themselves, but also from the fact that vehicles being towed may have crossed state lines, that the contracts entered into for towing services are frequently interstate in nature, that interstate ownership of towing services is on the rise, and that national programs such as Triple-A, OnStar, and automaker service packages that include towing are themselves elements of interstate commerce.

Furthermore, the inherently commercial and mobile nature of motor carriage services, and Congress' desire to facilitate a free and unburdened national market in such services, easily involves a substantial effect on interstate commerce even where particular instances of motor carriage occur within a single State. This Court has recognized that the scope of the commerce power was influenced by "great changes that had occurred in the way business was carried on

in this country." *United States* v. *Lopez*, 514 U.S. 549, 556 (1995). Just as in so many areas of the economy where "enterprises that had once been local or at most regional in nature had become national in scope," *id.*, so too has motor carriage in general, and towing in particular, transformed from a local to a regional and increasingly national industry. While this Court has questioned some of Congress' more ambitious efforts to regulate noncommercial local activity, it has squarely confirmed Congress' authority over intrastate commercial matters that affect an integrated national economy. *See id.* at 558 ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"); *id.* at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *id.* at 561 (distinguishing criminal statute that "has nothing to do with 'commerce' or any sort of economic enterprise" from "cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce").[4]

The preemption authority exercised by Congress in § 14501(c) over matters relating to price, route, or service of motor carriers of property does not even approach the outer boundaries of Congress' well-settled and recently confirmed Commerce Clause power. As Justice Kennedy has explained:

---

[4] That in any specific instance a particular tow may itself be intrastate, or that towing in general may involve a significant percentage of intrastate activity, does not change matters at all. Congress is entitled to legislate categorically and need not create exceptions to its general rules on commerce solely for the particular instances that do not perfectly align with the general purpose or authority. *See Maryland* v. *Wirtz*, 392 U.S. 183, 197 n. 27 (1968) ("where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence").

> Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power * * * mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

Lopez, 514 U.S. at 574 (Kennedy, J., concurring). There is thus no credible, let alone serious, constitutional doubt that would justify applying of a cannon of avoidance when interpreting § 14501.

B. Tenth Amendment Concerns Are Minimal.

While petitioners' *amici* complain of perceived Tenth Amendment violations, Congress is exercising preemptive authority comfortably within its commerce power, which strongly tends to negate any Tenth Amendment concerns absent some truly exceptional attempt to commandeer state officers to carry out a federal program against their will. In *Printz* v. *United States*, 521 U.S. 898, 905 (1997), for example, this Court rejected an attempt at "compelled enlistment of state executive officers" that sought to force them to act as agents of the national government by "press[ing] them into federal service" to "execute federal laws." But this Court distinguished the situation where a statute "did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field." 521 U.S. at 929 (citations omitted).

In *New York v. United States*, 505 U.S. 144 (1992), this Court similarly rejected an effort to commandeer state legislatures by compelling them to adopt a federal program. This

Court again noted that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167. The statute in *New York*, however, went further and directly compelled state legislative acts. *Id.* at 175-76. Such compulsion, this Court had observed, differs from preemption in that it shifts accountability by leaving state officials no choice but to regulate according to federal commands and "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

This brief review of *Printz* and *New York* demonstrates that there is no Tenth Amendment violation lurking in this case. A valid prohibitory statute serving to free up the channels and instrumentalities of commerce, and to facilitate a competitive national market in motor carriage services, is a far cry from the exceptional commandeering of state personnel or legislatures. It merely tells States and localities what they may not do, not what they *must* do, and forbids the adoption of fragmented local "safety" regimes that also relate to price, route, or service. Other local safety regulation unrelated to the area of federal interest are left intact, as is the States' authority to adopt, or not adopt, still further safety measures that might otherwise fall within the federal field. Separate state and federal accountability thus is preserved by the option for the States not to regulate at all within the preempted field, and leave the "electoral ramifications" of such preemption to rest at the national government's door.

This Court recognized the validity of just such a regime in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, observing that the conditional exception to federal preemption in that case "establishes a program of cooperative federalism that allows the States, *within limits established by federal minimum standards*, to enact and administer their own regula-

tory programs." 452 U.S. 264, 289 (1981) (emphasis added). And this Court rejected the claim that the conditions placed on state conduct within the preempted field improperly restricted the "States' freedom to make decisions in areas of 'integral governmental functions,'" finding that such claim was based on the "incorrect" assumption that "the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce." *Id.* at 289-90. The precise same analysis applies in this case.

In setting out the basic scope of preemption, Congress was well within its authority to forbid the States and their political subdivisions from regulating in relation to the price, route, or service of motor carriers of property. Congress then chose, but surely was not compelled, to allow the States alone to trench upon this area of exclusive federal authority, but only to the extent that such regulations *also* related to the safety of motor vehicles.

Given the initial starting point of lawful and undisputed federal preemption, and the unrequired softening of some of the effect of federal supremacy, it can hardly be said that Congress has violated state rights because it did not give them yet more leeway. Congress need not have given them any leeway at all. The parties never argue otherwise. If Congress can eliminate state authority in a particular area of federal interest, then surely it can condition limited exercise of such state authority on the State itself making the decisions rather than merely abdicating such authority to lesser entities. *See Mortier*, 501 U.S. at 616 (noting that Congress is free to enact legislation to prevent local regulation from burdening commerce, but simply had not done so in FIFRA)

The notion that the State is free to set up political subdivisions and other instrumentalities to act in areas the State itself chooses to avoid is no different than other "integral government functions" that may be conditionally preempted, *Hodel*, 452 U.S. at 289, and is hardly a sufficient basis for creating

an overbearing presumption in favor of such authority where the statutory language is to the contrary. The State also has generally unimpeded authority to establish private corporations or to cede its authority to private citizens in general, but surely is not assumed to have authority to let all those below it likewise act in derogation of otherwise applicable federal law that contains a limited exemption for the State itself.

Cases discussing a State's authority relative to its political subdivisions generally arise in very different contexts than the situation on this case. Some involved constitutional challenges by citizens to the composition, governance, or functions of political subdivisions. *See, e.g., Sailors* v. *Board of Ed. of Kent Cty.*, 387 U.S. 105, 108 (1967) (due process and equal protection challenge to appointment of local officers); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) (constitutional challenge to State's decision to consolidate two political subdivisions into one). Others involved the relationship between States and subdivisions in connection with the States' own means of governance at the state level. In *Reynolds* v. *Sims*, 377 U.S. 533, 575-76 (1964), for example, this Court was discussing the subordinate nature of municipalities to distinguish them from sovereign States, to reject an analogy between the Federal-State relationship and the State-Locality relationship, and thereby to *strike down*, on equal protection grounds, the State's attempt to apportion votes in its legislature to its localities according to the federal model of representation. What these cases have in common is that they discuss the State's authority over it's political subdivisions vis-à-vis *its own citizens* not in the context of federal statutes that treated localities differently from States in order to accomplish some federal purpose. But while States may indeed have a relatively free hand in composing their subordinate creatures, nothing in those cases suggests a federal obligation to accord such subordinates equal consideration to the States themselves when deciding what sorts and sources of regulation will be allowed within a field of federal interest.

Viewed in proper perspective, therefore, there are few legitimate Tenth Amendment concerns in this case, and certainly none that even approaches a substantial constitutional question that need be "avoided" through a strained construction of the language of § 14501.

While general considerations of comity are certainly valid even within the plain scope of congressional power, Federal/State comity is a two-way street and is equally owed to Congress when it has exercised its constitutional powers. Where the baseline, as in this case, is the express and unequivocal preemption of both State and local regulation, presumptions against preemption should carry considerably less weight. Imposing a series of additional judicial hurdles for each exercise or adjustment of power within a field of express federal preemption denigrates the supremacy of federal legislation and swings the pendulum of comity out of balance just as much as does the allowance of casual and unintended preemption of state authority where Congress has *not* preempted a particular field. Because this case involves a limited exception to the express preemption of a field of federal interests, the Court should place primary emphasis on the language Congress selected, the context in which it arises, and the interrelation of closely related provisions.

II. THE PLAIN LANGUAGE OF SECTION 14501 EXPRESSLY DISTINGUISHES BETWEEN STATE AND LOCAL REGULATORY AUTHORITY.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). In this case it is the specific context of § 14501 that unambiguously establishes distinct and exclusive meanings for "State" and "political subdivision" and excludes the latter from the safety exemption of § 14501(c)(2).

Language throughout § 14501 confirms that when Congress intended to preserve the otherwise preempted authority of political subdivisions, it did so in a far more direct fashion. Section 14501(a)(1), for example, preempts, *inter alia*, any "State or political subdivision" from enacting certain rules relating to motor carriers of passengers, rather than property. But it expressly states that such preemption "shall not apply to intrastate commuter bus transportation." By exempting the entire subfield of intrastate commuter buses, in contrast to § 14501(c)(2)(A)'s specific limitation of the conduct of a particular government actor within a subfield, the exception plainly covers conduct by *any* of the actors listed in the preemption provision. Section 14501(c)(2)(B) likewise contains a similarly actor-neutral field exemption for the "transportation of household goods," and § 14501(c)(2)(C) contains an express exemption for political subdivisions, restoring the otherwise plainly preempted "authority of a State or political subdivision of a State" to regulate the price of non-consensual tows. Section 14501(c)(3) is similarly direct in providing that the general preemption clause "shall not affect any authority of a State, political subdivision of a State, or political authority of two or more States" to act with respect to intrastate transportation of property in providing certain voluntary uniform rules and antitrust immunity. Such evidence of usage from within the same statutory section provides the most compelling evidence of the meaning of the word "State" in the safety exemption. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998) ("similar language within the same statutory section must be accorded a consistent meaning")

Numerous other statutes demonstrate that when Congress intends to preserve the authority of both the States and their political subdivisions, it does so quite clearly, thus supporting the Sixth Circuit's conclusion that the exclusion of political subdivisions from the safety exemption was meaningful. For example, under the Plant Protection Act, Congress has pro-

vided that "no State or political subdivision of a State may regulate the movement in interstate commerce" of certain plants, 7 U.S.C. § 7756(b)(1), but then allowed a "State or a political subdivision of a State [to] impose prohibitions or restrictions * * * that are consistent with and do not exceed the regulations or orders issued by the Secretary" and allowed a "State or political subdivision of a State [to] impose prohibitions or restrictions * * * that are in addition to the prohibitions or restrictions imposed by the Secretary under certain conditions, 7 U.S.C. § 7756(b)(2).[5]

While the narrow use of the word State in other statutes does not determine its meaning in § 14501, it does demonstrate that the word's correct meaning is context dependent and that petitioners' suggestion of a "tradition of meaning" that inherently includes the right to delegate to political subdivisions is pure fiction. Rather, while statutory references to

---

[5] *See also* 12 U.S.C. § 4122(b) ("This section shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subchapter"); 15 U.S.C. § 1203 ("no State or political subdivision of a State may establish or continue in effect a flammability standard" for certain fabrics, but allowing "the government of any State or political subdivision of a State [to] establish and continue in effect a flammability standard or other regulation applicable to a fabric, related material, or product for its own use" and allowing "application of a State or political subdivision of a State" for further exemptions); 25 U.S.C. § 2806 ("the provisions of this chapter alter neither * * * the law enforcement, investigative, or judicial authority of any * * * State, or political subdivision or agency thereof") ; 29 U.S.C. § 1144(c)(2) (ERISA preemption provision defining the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either"); 42 U.S.C. § 2000e-7. (Title VII savings clause providing that "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State," with some exceptions); 47 U.S.C. § 224 (preserving certain State regulatory authority over pole attachments for cable and telecommunications services, defining "State" to mean "any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof").

a "State's" authority may sometimes include the authority to delegate to political subdivisions, they just as frequently exclude such delegation and refer only to the State's authority to act itself, rather than through proxies. With specific context being the determining factor, there is simply no doubt that the exemptions for State motor vehicle safety regulatory authority in § 14501 is in contradistinction to the numerous specific references to political subdivisions in that same section.

Petitioners' reliance on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), illustrates not any inherently broad meaning to the "State" authority, but rather the context-dependent interpretation of any references to such authority. Indeed, the material differences between *Mortier* and this case are numerous and dispositive.

First, as this Court recognized in *Mortier*, FIFRA "nowhere expressly supersed[ed] local regulation of pesticide use." 501 U.S. at 606; *see id.* at 607 ("the statutory language * * * is wholly inadequate to convey an express preemptive intent on its own"); *id.* at 610 n. 14 (it is "clear that the provision is written exclusively in terms of a grant," not a prohibition). The preemption clause in § 14501(c), by contrast, *expressly* supersedes the authority of "political subdivision[s]," and nowhere expressly *redeems* local authority from Congress' unambiguous preemption of the field. While the question in *Mortier* was thus whether to infer *preemption* of local authority – an inference not lightly drawn – the question in this case is whether to infer an *exception* to the express preemption of local authority – an inference that likewise should not be lightly drawn.

Similarly, unlike in *Mortier* where preemption was claimed from "mere silence," and thus would have relied on the disfavored "negative pregnant" described by petitioners, Pet. Br. 22, in this case the negative that arises from the failure to save local authority is not pregnant at all, but is fully born in § 14501(c)'s express negation of local authority.

The point is illustrated by examining the result if there were no *savings* clause in either *Mortier* or this case. In *Mortier* there would be no field preemption of either state or local authority, as this Court recognized. *See* 501 U.S. at 607 (noting that there was "no suggestion that FIFRA was a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States"). Absent the savings clause, therefore, any preemption would have been determined on a case-by-case conflict analysis. *Id.* ("Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities," it would only mean "that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federal law."); *id.* at 614 ("The specific grant of authority in § 136v(a) * * * acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.").

The claim in *Mortier* that local authority was preempted from the entire field, therefore, was exclusively derived from a negative implication from the savings clause itself, which allegedly generated field preemption where none would otherwise exist. But such an inference of field preemption in general would have rendered other more specific preemptive provisions in FIFRA "pure surplusage." *Id.* at 613. This Court went on to hold that regardless whether the grant of authority to the States included localities, "the type of local regulation at issue here would not fall within any impliedly pre-empted field." *Id.* at 614.

In the current case, by contrast, there is no question that absent the savings clause local authority – including local motor vehicle safety authority – would be fully and expressly preempted insofar as it related to price, route, or service of motor carriers of persons or property. The "negative" of preemption does not rely on any inference from the savings

clause. Rather, it exists independently. Unlike in *Mortier*, where there was "no actual conflict either between FIFRA and the ordinance before us or between FIFRA and local regulation generally," *id.*, here there is plainly a conflict between the Columbus Ordinance and the general preemption clause. And in contrast to *Mortier*, it is only the broader reading of "State" to encompass "political subdivision" that would render language in the same statute "surplusage."

Second, the statutory language construed in *Mortier* was not, contrary to petitioners' suggestion, Pet. Br. 18, the phrase "regulatory authority of a State." Rather, the statutory language there read, in relevant part, that a "*State may regulate* the sale and use of any federally regulated pesticide or device in the State." 7 U.S.C. § 136v(a). That language, however, does not mirror the language of the savings clause at issue in this case, but instead tracks more closely to the phrase in the *preemption* clause of § 14501(c)(1), which reads that a "*State* [or] political subdivision * * * *may not enact or enforce a* law, *regulation*, or other provision" related to price, route or service. The phrase "regulatory authority" that petitioners so heavily rely on comes not from the statute in *Mortier*, but rather from the Court's own abbreviated summary of the import of the statute. Insofar as Congress would look to *Mortier* as a signal for future statutory phraseology, it would most reasonably look to the actual statutory language – "A State may regulate" – that was interpreted in that case, not to this Court's varying paraphrases of that language. *See* 501 U.S. at 602, 607 ("States may regulate"; "state regulation"; "authorizes 'States' to regulate"; "grant of regulatory authority to the States"; "regulatory authority explicitly conferred upon the States").

Focusing on the actual language of the statute in *Mortier* not only deflates petitioners' claims of a fixed Congressional understanding of the different phrase "regulatory authority," it also points up the inconsistency in petitioners' attempts to draw a distinction based on sentence structures within

§ 14501(c). *See* Pet. Br. at 23. Given that the FIFRA language addressed in *Mortier* tracks more closely to the preemption clause here, any supposed pattern followed by Congress would more reasonably have been found there rather than in the safety exemption. But Congress, if it had the FIFRA language in mind at all, indisputably departed from that model by expressly referencing political subdivisions when *Mortier* would supposedly have indicated that such reference was unnecessary. The obvious explanation for such a departure is that Congress had a particular need in § 14501 to provide separate reference to States and political subdivisions in the more analogously structured sentence because it intended to treat them separately and differently, rather than as a unity, for purposes of preemption. And § 14501(c)(2) immediately bears out that intent by reinstating certain powers of the States alone but leaving political subdivisions uninsulated from the primary preemption clause.

Third, in FIFRA itself there was conflicting language that squarely authorized conduct by local authorities, and which would have been rendered nonsensical by a narrow construction of "State" authority in that case. As this Court recognized, if "the use of 'State' in FIFRA impliedly excludes subdivisions, it is unclear why the one provision would allow the designation of local officials for enforcement purposes while the other would prohibit local enforcement authority altogether. *Mortier*, 501 U.S. at 608-09; *see also*, *id.* at 616 (Scalia, J., concurring in the judgment) (language of subsection suggests a preemptive interpretation "were it not for the inconsistent usage pointed to in Part I of the Court's opinion"). In this case, by contrast, there is no inconsistent usage within the same statute.[6]

---

[6] This Court in *Mortier* also noted that the "scattered mention of political subdivisions elsewhere in FIFRA does not require their exclusion here." 501 U.S. at 612. In this case, by contrast, the numerous references to political subdivisions are not "scattered" at all, but occur repeatedly in the very same section, in subsections that expressly preserve certain authority

Petitioners also suggest that the inclusion of political subdivisions in the preemption clause was merely belt-and-suspenders redundancy, and that the exclusion of the term from the motor vehicle safety exemption was in deference to the States regarding the choice of further delegation to their subdivisions. Pet. Br. 24. Both suggestions are fanciful.

Petitioners' belt-and-suspenders theory of construction seeks to impute a meaningless redundancy to Congress despite this Court's long-held rejection of such constructions. *See Mortier*, 501 U.S. at 613 (rejecting construction that would render "pure surplusage" and ""doubly superfluous" the language in the immediately following subsection). Furthermore, if redundant certainty were Congress' goal, surely it would have utilized the same device in the exemption clause as well – just to make sure no court would draw the natural, obvious, and more limited conclusion that the difference in statutory language actually had substantive meaning. The notion that it only listed the States in deference to their discretion to delegate authority further is not even remotely credible. Congress *did* list both levels of government as eligible for an exemption when that was its intent. 49 U.S.C. §§ 14501(c)(2)(C) & (c)(3). And listing both States and localities as merely being *exempt* from preemption would not imply any lack of deference to State authority over political subdivisions and surely could not be read as *conferring* independent local power as against the States.

Ultimately, against the background of express field preemption here, the plain usage is be precisely the opposite of that suggested by petitioners and carries the meaning ascribed by the Sixth Circuit. Indeed, Justice Scalia recognized just such a point in *Mortier*, noting that while FIFRA itself did not preempt the field at issue, "[i]f there *were* field preemption, 7 U.S.C. § 136v would be understood not as restricting certain

---

for political subdivisions, and in the primary preemption clause itself, which preempts certain laws by political subdivisions.

types of state regulation (for which purpose it makes little sense to restrict States but not their subdivisions) but as *authorizing* certain types of state regulation (for which purpose it makes eminent sense to authorize States but not their subdivisions)." *Mortier*, 501 U.S. at 616 (Scalia, J., concurring in the judgment). In this case, of course, there *is* express field preemption that specifically applies to both States and political subdivisions, and the language of § 14501(c)(2) is plainly understood as authorizing certain State regulation "for which purposes it makes eminent sense to authorize States but not their subdivisions."

III. THE SUPPOSED CONFLICTS GENERATED BY THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 14501 STEM FROM UNWARRANTED ASSUMPTIONS ABOUT THE SCOPE OF PREEMPTION.

The various peculiar consequences claimed by the parties and their *amici* to arise from the Sixth Circuit's reading of § 14501 will not come to pass because they are based on erroneous assumptions regarding the scope of the preemption clause and the safety exemption. While scope issues are not before the Court in this case, merely recognizing that preemption operates only on that subset of safety regulations also relating to price, route, or service, and that the safety exemption applies only to motor vehicle safety, is sufficient to eliminate any conflicts or absurdities without reaching the precise substantive scope of the relevant clauses.

A. The Sixth Circuit's Preemption Analysis Does Not Conflict with Federal Review Authority Over State and Local Safety Regulations in General.

Petitioners and the United States as *amicus* argue that the Secretary of Transportation's authority to review local safety regulations demonstrates that such regulations that also relate to price, route, or service are not preempted lest the Secre-

tary's authority lack a meaningful predicate. Pet. Br. 29; U.S. Br. at 18-20. That argument is incorrect.

First, the Secretary's review authority, enacted long before the statute in this case, and thus prior to express preemption, has little bearing on interpreting the later-enacted preemption provisions of § 14501. There is no indication that Congress intended to preserve the prior regulatory regime and, indeed, its intent was the precise opposite. As this Court recognized in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992), even an express "general 'remedies' savings clause cannot be allowed to supersede the specific substantive preemption provision," especially where "the 'savings' clause is a relic of the pre-ADA/no preemption regime." What was true in *Morales* carries even greater force here because the Secretary's review authority does not even purport to "save" or "authorize" local regulation that would be preempted by other statutes. It merely allows the Secretary to impose even *further* preemption as against local regulation that might otherwise exist. Because § 14501(c)(1) is substantively indistinguishable from the ADA provision in *Morales*, and the Secretary's review authority is equally a "relic" of the previous "no preemption regime," this Court should reach the same result here as it did in *Morales*. Indeed, given petitioners' heavy reliance on the proposition that Congress legislates against the background of judicial construction, Congress' decision to model the FAAA Act on the ADA shortly after the *Morales* decision indicates an expectation that this Court would discount inconsistencies with relics of the no preemption regime and fully intended that any vestigial regulatory references be superseded by the new preemption provision.[7]

[7] Such an assumption of direct incorporation of virtually on-point precedent is far more reasonable than assuming that Congress chose the language of the safety exemption by reference to this Court's *paraphrase* of different statutory language in an entirely different field that is the responsibility of entirely different congressional subcommittees.

Second, the claim that preemption of some local motor vehicle safety regulation would vitiate the Secretary's review authority incorrectly assumes that *all* local safety regulation would be preempted by § 14501(c)(1) absent a local exemption under § 14501(c)(2). But the preemption clause itself plainly leaves room for local safety regulation that is *unrelated* to price, route, or service, wholly apart from the applicability of the safety exemption. The proper reconciliation of § 14501 and the federal review authority is that localities may not impose any safety regulations that *also* relate to price, route, or service, but may impose unrelated safety regulations that act as the predicate for the Secretary's review.

General speed limits illustrate the point, as it seems beyond reasonable dispute that speed limits applicable to all vehicles rather than just motor carriers – like restrictions against driving down the sidewalk or running red lights – do not "relate to" the price, route, or service of a motor carrier and thus would not be preempted by § 14501(c)(1). *Cf. American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 227-33 & n. 7 (1995) (discussing scope and limits of preemption under ADA); *id.* at 242 (O'Connor, J., concurring in part and dissenting in part) (same). One could imagine, however, a locality setting an unusually low speed limit on a particular through road as a trap for the unwary and a device for generating local revenue through speeding tickets.[8]

A similar reconciliation applies to the Secretary's review authority over State and local weight, width, and hazardous materials restrictions. For example, a sign declaring the weight capacity of a small local bridge, and forbidding any

[8] As anyone who has driven to vacation spots with high tourist traffic has likely experienced, some localities en route will suddenly and inexplicably lower their speed limit to the level of a crawl on an otherwise unexceptional road, and then conveniently post a squad car to hand out tickets with alacrity. Such a local "safety" regulation would not be expressly preempted by § 14501(c), but might be found an unnecessary burden were the Secretary asked to consider the matter.

overweight vehicles – commercial or otherwise – from driving on the bridge likely would not have a sufficient "connection" to be preempted. But the Secretary would retain review authority in case a locality understated the weight capacity as a subterfuge for controlling the routes of motor carriers.

By recognizing that there are some limits to the preemption clause even apart from the safety exemption, this Court can find ample retained meaning for the Secretary's review authority while at the same time applying the plain meaning of § 14501(c)(2) to exclude political subdivisions.

B. Preemption of Local Authority to Enact or Enforce Their Own Laws Does Not Preclude Them from Assisting in the Enforcement of Valid Laws Established at a Higher Level of Government.

Petitioners suggest that excluding political subdivisions from the motor vehicle safety exemption would not only bar them from enacting or enforcing their own preempted regulations, but would also absurdly preclude them from enforcing valid state laws allowed by the safety exemption. Pet. Br. at 26. That reading, however, is incorrect in that it abstracts the word "enforce" from its overall context within the preemption clause. A proper contextual reading of the preemption clause, however, is that neither the States nor political subdivision may enact *new* laws or enforce *existing* laws that are invalid under the preemption clause. That reading of the preemption clause recognizes that the function of the word "enforce" is not to impose a limit on the implementation of otherwise valid laws, but rather to close the temporal gap that would exist by use of the word "enact" alone. If the statute merely precluded "enactment" of laws within the scope of the preemption analysis, it would leave open the question of whether *existing* laws that would be preempted if newly enacted were nonetheless grandfathered. By adding the word "enforce," the preemption clause makes clear that no such grandfathering was intended and that a law within the scope of the clause is preempted regardless of when it was adopted.

But where a particular law *is* valid as being outside the preemption clause or exempted therefrom, such laws may be enforced by whatever level of government is authorized to do so. Such ministerial enforcement of otherwise valid laws was simply not meant to be preempted, thus avoiding the absurdity suggested by petitioners' reading while preserving the plain distinction in the scope of state and local authority.

That common-sense reading of the "enforce" language to refer to existing laws that would be preempted if adopted anew finds support in both the Department of Transportation's own memoranda and in this Court's cases. For example, in a memorandum cited by the United States, the Department of Transportation opined that the FAAA Act "'specifically reserves the States' (and local governments[']) to the extent that they derive power from the States) authority to regulate with respect to safety * * *.'" U.S. Br. at 25 (quoting *Memorandum re: Federal Aviation Administration Authorization Act of 1994* at 2 (Jan. 1995)) (emphasis omitted). What is significant about this passage is not merely the mention of localities, as the United States would have it, but the qualification that the Department interprets the Act to allow localities to act *only* "to the extent that they derive power from the States." Under the current litigating positions of the petitioners and the United States, however, that qualification would be utterly meaningless: *All* local power derives from the States and there is simply no "extent" otherwise. Assuming the Department of Transportation was not intending to include nonsensical commentary in its memorandum, it must have believed that there is some local authority that would *not* "derive" from the States and that would therefore be preempted.[9] The sensible answer is that the Department at the

---

[9] Of course it might well be that the Department's analysis of the FAAA Act was simply cursory and poorly thought out, leading to what now

time understood such derivative power to be that of *enforcing* otherwise valid state laws and regulations, but did not reach "to the extent" of allowing localities to enact or enforce their own substantive requirements under more general discretionary authority merely abdicated to them by the State.

Similar support for the notion that local enforcement of valid state substantive law should be treated differently from local enactment and enforcement of its own preempted requirements can be found in *Mortier*. There this Court recognized a distinct category of local ordinances "enacted independently of specific state or federal oversight." 501 U.S. at 615. And while this Court in *Mortier* found that such independent local conduct was not preempted by FIFRA, what is significant for current purposes is the implicit recognition that independent local conduct might ultimately pose a different question than mere enforcement authority specifically tied to a state program. Given that § 14501(c)(1) in this case *does* specifically preempt local laws and regulations relating to price, route, or service, the most sensible construction of the "enact or enforce" language would focus on the temporal function of the word "enforce" while recognizing that preemption did not apply to local enforcement of specific state laws validly enacted by the State itself. In such situations, localities would indeed be acting as ministerial agents of the State rather than in their own discretionary capacity.

Finally, if petitioners' reading of the word "enforce" in isolation were correct, it would lead to its own absurd results under petitioners' preferred interpretation of the remainder of the statute. If the authority to enforce were preempted independently of the substantive validity of the law or regulation

---

seems nonsensical in light of the United States' litigating posture. But if that is so, the memorandum is entitled to no deference whatsoever. And the United States' current attempt to recharacterize that memorandum to mean something other than what it says is likewise entitled to no deference, being no more than a convenient litigating position.

being enforced, that would preclude both state and local governments from assisting in the enforcement of *federal* regulations relating to price, route, or service that could not be *enacted* by the States or their subdivisions alone. Given the express contemplation of such cooperative enforcement of federal regulations, such a result would be absurd, and suggests a misreading of the scope of preemption in the first place.

Overall, a proper construction of the word "enforce" would be tied to the validity of the underlying law or regulation being enforced. Municipalities would thus be able to enforce valid state motor vehicle safety laws and regulations, but could not enact or enforce their own such laws insofar as they also related to price, route, or service. That reading is fully compatible with the Sixth Circuit's decision and avoids any absurdities regarding enforcement of state law.

C. The Remaining Scope of State and Local Preemption Accords with Common Sense in Light of Congress' Free-Market Goals.

Petitioners and their *amici* make much of the supposedly absurd consequences of preempting local motor vehicle safety authority related to price, route, or service. Those claims, however, are based on various erroneous assumptions concerning the substantive scope of both the preemption clause and the savings clause. While issues of scope are not before this Court, it is nonetheless important to recognize that the parade of horribles claimed to ensue from local preemption simply disappear with the recognition of some general limits on the scope of "relate to" preemption.

For example, the fear that speed limits and basic generally applicable traffic laws will be preempted disappears with the recognition that such laws lack the requisite "connection" with motor carrier price, route, or service. As this Court observed in *Morales*, "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect." 504 U.S. at 390 (citation and quotations

omitted) (brackets in original). The same would be true for the posting of the weight capacity of bridges, underpass clearance, and street width limits, so long as they applied to vehicular traffic generally, not just motor carriers. Local authority to enact such measures does not depend upon the safety exemption.

On the other side of the coin, consumer protection statutes, method of payment requirements, hours of operation mandates, and restrictive licensing schemes would all seem to plainly relate to prices and services. *See Wolens*, 513 U.S. at 226-27 (consumer protection statutes relates to price and service). And while it is an inexplicably confused question in the lower courts as to whether such laws constitute *motor vehicle* safety regulations, in either case no absurdity results. Either such laws *are not* motor vehicle safety regulations – as seems fairly plain – and hence are preempted at both the state and local level regardless of the safety exemption, or they *are* motor vehicle safety regulations and thus can be adopted by the States themselves. Given that localities lack any particular advantage in adopting such laws piecemeal, uniform state laws in this category create no absurd results.

Finally, as to matters that plainly involve motor vehicle safety, such as emergency lights, adequate cables and chains, vehicle maintenance, and the like, such requirements are perfectly suited for adoption at the state level in the same manner as all other general vehicle safety and inspection requirements are imposed by the States. Local preemption of such matters thus poses no danger to vehicle safety and helps reduce a potential morass of conflicting and duplicate requirements, facilitating a fluid and unburdened market as was Congress' intent.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

MICHAEL P. MCGOVERN
AYRES & PARKEY
708 South Gay Street
Knoxville, TN 37901
(865) 637-1181

Counsel for Amicus Curiae

Dated: March 21, 2002.

Supreme Court, U.S.
FILED
MAR 21 2002
CLERK

No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,
Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR *AMICUS CURIAE* CARGO AIRLINE ASSOCIATION IN SUPPORT OF RESPONDENTS

DREW S. DAYS III
BETH S. BRINKMANN
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-1500

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN *
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-7000

* Counsel of Record

Counsel for *Amicus Curiae* Cargo Airline Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT	2
A. Federal And State Regulation Of Cargo Transportation	3
B. Deregulation Of Cargo Carriers	4
1. Air Carriers	4
2. Motor Carriers	5
3. The FAAAA	6
C. The ICC Termination Act's Amendment Of The FAAAA To Permit Rate Regulation Of Non-Consensual Towing	11
D. Requests To Congress To Re-Regulate Tow Truck Operators	12
E. The Regulations At Issue	13
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THE FAAAA DOES NOT PREEMPT STATE OR LOCAL TRAFFIC LAWS OR OTHER GENERALLY APPLICABLE SAFETY REGULATIONS THAT DO NOT RELATE TO THE PRICE, ROUTE, OR SERVICE OF CARRIERS OF PROPERTY	16

TABLE OF CONTENTS—Continued

	Page
II. THE QUESTION OF THE PROPER SCOPE OF STATE AUTHORITY TO ENFORCE SAFETY REGULATIONS RELATED TO CARGO CARRIERS' PRICE, ROUTE, OR SERVICE HAS NOT BEEN PRESENTED TO THE COURT AND SHOULD NOT BE DECIDED AT THIS TIME	22
A. Petitioners' Assumptions About The Broad Scope Of The Preserved "Safety Regulatory Authority Of A State With Respect To Motor Vehicles" Are Inconsistent With Federal Laws Limiting State Regulatory Authority Over Commercial Motor Vehicle Safety To Enforcement Of Accident-Prevention Laws That Apply To All Commercial Motor Carriers	26
B. Petitioners' Assumptions About The Broad Scope Of The Preserved "Safety Regulatory Authority Of A State With Respect To Motor Vehicles" Also Are Inconsistent With The Federal Single-State Registration System	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
A&A Wrecker Serv. v. City of Galveston, No. G95-111, 1996 U.S. Dist. LEXIS 21513 (S.D. Tex. June 10, 1996)	12
Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	17
Aloha Islandair, Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997)	18
Anderson v. American Airlines, Inc., 2 F.3d 590 (5th Cir. 1993)	18
Boston & Maine R.R. v. Hooker, 233 U.S. 97 (1914)	3
Brown v. General Services Admin., 425 U.S. 820 (1976)	9
Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997)	8, 23
Christensen v. Harris County, 529 U.S. 576 (2000)	26
City of Dallas v. Southwest Airlines Co., 494 F.2d 773 (5th Cir. 1974)	4
Dist. of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992)	23
Federal Express Corp. v. Cal. Pub. Utilities Com[illegible]n, 936 F.2d 1075 (9th Cir. 1991)	6
Healy v. Beer Inst., 491 U.S. 324 (1989)	21
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)	*passim*
N. Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978)	17
Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001)	19, 24
R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998)	23

TABLE OF AUTHORITIES—Continued

	Page
Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190 (9th Cir. 1999)	6, 7
Rusello v. United States, 464 U.S. 16 (1983)	28
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	18
United States v. Locke, 529 U.S. 89 (2000)	17
Wellons v. Northwest Airlines, Inc., 165 F.3d 493 (6th Cir. 1999)	18
Western Ports Transp., Inc. v. Employment Sec. Dep't, No. 48294-7-I, 2002 Wash. App. LEXIS 347 (Wash. App. Mar. 4, 2002):	18
Whitten v. Vehicle Removal Corp., 56 S.W.3d 293, 306 (Tex. App. Dallas 2001)	29
STATUTES AND REGULATIONS	
Act of November 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278	4
§ 18(a), 91 Stat. 1286-87	4
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705:	
§ 4(a), 92 Stat. 1708	5
§ 37(a), 92 Stat. 1741	5
§ 40(a), 92 Stat. 1745	5
Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973:	
§ 403(a), 52 Stat. 992	3
Federal Aviation Administration Authorization Act of 1994, Pub. Law 103-305, 108 Stat. 1569	1
§ 601(a)(1), 108 Stat. 1605	7, 21
§ 601(b), 108 Stat. 1605	6, 9
§ 601(c), 108 Stat. 1606	6, 7, 9
H.R. 4955, 106th Cong. (2000)	13

TABLE OF AUTHORITIES—Continued

	Page
ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803	7
Sec. 103, § 14501(c)(2)(C), 109 Stat. 899	12
Interstate Commerce Act of 1887, 24 Stat. 379:	
§ 3, 24 Stat. 380	3
Intrastate Motor Carrier Transportation Technical Corrections Act of 1994, S. 2454, 103rd Cong. (1994)	13
Intrastate Tow and Wrecker Truck Transportation Technical Correction Act of 1994, H.R. 5123, 103rd Cong. (1994) (version 3, introduced Nov. 30, 1994)	13
Motor Carrier Act of 1935, Pub. L. No. 255, 49 Stat. 543:	
§ 217, 49 Stat. 560-61	3
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793:	
§ 12, 94 Stat. 802-03	5
Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832	26
Pub. L. No. 103-272, 108 Stat. 745 (1994):	
Sec. 1(e), § 41713(b), 108 Stat. 862, 1378	5
Sec. 6(a), 108 Stat. 1143	5
S. 1368, 104th Cong. (1995)	13
Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1683:	
§ 206, 108 Stat. 1684	5
49 U.S.C.	
§ 1305	5
§ 5125	4, 9

TABLE OF AUTHORITIES—Continued

	Page
§ 11501(h)	7
§ 11501(h)(2)(A)	9
§ 14501(c)	2, 7, 11, 14
§ 14501(c)(1)	*passim*
§ 14501(c)(2)(A)	*passim*
§ 14502(c)(2)(C)	12, 13
§ 14504	4, 9, 29
§ 14504(b)	29
§ 14504(c)	29
§ 14504(c)(2)(A)(ii)	29
§ 30102(a)(8)	27
§ 30103(b)	4, 9
§§ 31111-31113	4, 9
§§ 31131-31147	4, 10
§ 31131(a)(1)	27
§ 31131(b)(1), (2)	27
§ 31141(a)	26
§ 41713(b)(1)-(3)	5
§ 41713(b)(4)	2, 6, 7
§ 41713(b)(4)(A)	*passim*
§ 41713(b)(4)(B)(i)	*passim*
Columbus, Ohio Business Regulation & Licensing Code (2001)	
§ 549.02	13, 20, 23
§ 549.065	13, 20, 23
§ 549.14	13, 29
§ 549.15	13
§ 549.16	13, 20
§ 549.18	13
Sup. Ct. R.	
37	1
37.6	1

TABLE OF AUTHORITIES—Continued

	Page
49 C.F.R.	
Pt. 350	
§ 350.101	27
§ 350.333(a)	26
Pt. 355	
§ 355.25(a)	26
App. A	26
OTHER AUTHORITIES	
146 Cong. Rec. 1321 (2000) (Statement of Rep. Moran)	13
H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715	*passim*
H.R. Rep. No. 104-311 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793	5, 13
S. Rep. No. 98-424 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4785	27

INTEREST OF THE *AMICUS CURIAE* [1]

The Cargo Airline Association ("CAA") is a trade association of all-cargo air carriers and all-cargo motor carriers affiliated with air carriers through common controlling interest, including United Parcel Service, Federal Express, DHL Airways, Emery Worldwide, and Airborne Express.

In 1994, Congress enacted the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, 108 Stat. 1569. The FAAAA preempts State and local laws "related to a price, route, or service" of cargo carriers, including not only a "motor carrier" of property such as respondent towing company, *see* 49 U.S.C. § 14501(c)(1) (Supp. V 1999), but also "an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle," such as the CAA's members, *see* 49 U.S.C. § 41713(b)(4)(A) (1994).

This case concerns the "safety regulatory authority of a State with respect to motor vehicles" preserved by the FAAAA. 49 U.S.C. §§ 14501(c)(2)(A) (Supp. V 1999), 41713(b)(4)(B)(i) (1994). The FAAAA has no effect on traffic laws and other generally applicable safety regulations that do not relate to cargo carriers' price, route, or service. Petitioners nevertheless argue that the FAAAA permits municipalities to enact and enforce safety regulations that are related to carriers' price, route, or service, despite the Act's explicit preemption of such laws, through State delegation of the safety authority preserved by Section 14501(c)(2)(A). Because Congress intended to "level the playing field"

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court. *See* Sup. Ct. R. 37. Counsel for the parties to this action did not write this brief, in whole or in part, and only *Amicus*, one of its members (United Parcel Service, Inc.), and its counsel of record made monetary contributions to the preparation and submission of this brief. *See* Sup. Ct. R. 37.6.

between air and motor carriers with respect to preemption, and the CAA's members are among the "national and regional carriers attempting to conduct a standard way of doing business" that Congress intended to benefit from FAAAA preemption (H.R. Conf. Rep. No. 103-677, at 82, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754, 1759) the CAA and its members have a significant interest in the outcome of this case.

STATEMENT

The FAAAA contains a broad motor carrier preemption provision, 49 U.S.C. § 14501(c), which provides in relevant part:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The Act also includes a companion provision with identical preemptive language that addresses transportation of property by air carriers or by an air carrier and its affiliated motor carrier, known as an "intermodal" carrier. It preempts State and local laws "related to a price, route, or service" of "an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle." 49 U.S.C. § 41713(b)(4)(A). Both of the FAAAA preemption provisions contain subsections that identify "Matters Not Covered," which state in part that the rule of preemption "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i).

This case presents the question whether the FAAAA permits municipalities to enact and enforce safety regulations that are related to the price, route, or service of motor carriers of property that are subject to the Act's protections, such as respondent tow truck operator. Petitioners argue that such regulation is permissible because States may delegate to municipalities the "safety regulatory authority of a State with respect to motor vehicles" preserved by the FAAAA. Proper resolution of these issues requires knowledge of Congress's policy toward interstate and intrastate transportation of property, evolving from historical regulation to substantial deregulation implemented in large part through the FAAAA.

A. Federal And State Regulation Of Cargo Transportation

Historically, Congress heavily regulated the interstate transportation of cargo, whether by rail, motor, or air carriage. *See, e.g.*, Interstate Commerce Act of 1887, § 3, 24 Stat. 379, 380 (prohibiting rate discrimination by interstate rail carriers); Motor Carrier Act of 1935, Pub. L. No. 255, § 217, 49 Stat. 543, 560-61 (requiring interstate motor carriers to file tariffs with Interstate Commerce Commission); Civil Aeronautics Act of 1938, Pub. L. No. 706, § 403(a), 52 Stat. 973, 992 (requiring interstate air carriers to file tariffs with Civil Aeronautics Authority). From the inception of the Interstate Commerce Act in 1887, this Court has described Congress's exercise of its powers over interstate cargo transportation in the broadest possible terms. *See, e.g., Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 110 (1914) ("the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation").

Congress did not, however, regulate the *intrastate* prices, routes, and services of intrastate or interstate cargo carriers;

any such regulation was left to the States. *See, e.g., City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 776 (5th Cir. 1974) ("Congress has not pre-empted the field of the economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law"); H.R. Conf. Rep. No. 103-677, at 86 (prior to enactment of FAAAA, 41 States "regulate[d], in varying degrees, intrastate prices, routes and services" of intrastate and interstate motor cargo carriers).

Congress also has permitted States to regulate intrastate commerce affecting interstate carriers, within prescribed limits, in matters such as motor vehicle safety standards, *see* 49 U.S.C. § 30103(b) (1994); commercial motor vehicle safety, *see* 49 U.S.C. §§ 31131-31147 (1994 & Supp. V 1999); the size of motor vehicles, *see* 49 U.S.C. §§ 31111-31113 (1994 & Supp. V 1999); the transportation of hazardous cargo, *see* 49 U.S.C. § 5125 (1994); and minimum amounts of financial responsibility related to insurance and self-insurance, *see* 49 U.S.C. § 14504 (Supp. V 1999).

B. Deregulation Of Cargo Carriers

1. Air Carriers

In 1977, Congress substantially deregulated air carriers of cargo, via the Act of November 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278. Among other things, the Act eliminated the Civil Aeronautics Board's authority to prescribe just and reasonable rates for all "interstate . . . air transportation," and restricted that authority solely to the "interstate air transportation of persons, air transportation of property within the State of Alaska, [and] air transportation of property within the State of Hawaii." Act of November 9, 1977, § 18(a), 91 Stat. at 1286-87.

In 1978, Congress extended deregulation to all air transportation, including the transportation of passengers, substantially reducing and eventually eliminating the Civil

Aeronautics Board's power over the rates of interstate air passenger carriers. Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, §§ 37(a), 40(a), 92 Stat. 1705, 1741, 1745. The ADA also freed air carriers, including air cargo carriers, from State regulation of *intrastate* price, route, or service:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier . . . .

Id. § 4(a), 92 Stat. at 1708.[2]

2. Motor Carriers

In 1980, finding that the cargo transportation industry had become "increasingly competitive," Congress began taking "a series of steps to deregulate" motor carriers of cargo. H.R. Rep. No. 104-311, at 91 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 803. The Motor Carrier Act of 1980, Pub. L. No. 96-296, § 12, 94 Stat. 793, 802-03 (1980), reduced the authority of the Interstate Commerce Commission ("ICC") over motor carriers' limited liability rates. In 1994, Congress eliminated the requirement that motor carriers of property file tariffs with the ICC. *See* Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, § 206, 108 Stat. 1683, 1684.

---

[2] The ADA provision preempting State laws "relating to rates, routes, or services of any air carrier" was originally codified at 49 U.S.C. app. § 1305 (1988). It was recodified as 49 U.S.C. § 41713(b)(1)-(3), and the quoted language was changed to "related to a price, route, or service," as part of a revision and recodification of Title 49 that made no "substantive change" in the law. Pub. L. No. 103-272, secs. 1(e), 6(a), § 41713(b), 108 Stat. 745, 862, 1143, 1378 (1994).

3. The FAAAA

Thus, by 1994, Congress had taken steps substantially to reduce *federal* regulation of both air and motor cargo carriers, but had preempted *State* laws related to the price, route, or service *of only air carriers*. Moreover, as Congress later noted, at least one court of appeals had ruled that the ADA preempted State laws related to the *trucking* operations of cargo air carriers. *See* H.R. Conf. Rep. No. 103-677, at 87 (discussing *Federal Express Corp. v. Cal. Pub. Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991)).

Congress sought to eliminate any differences between the preemption protection afforded to air and motor carriers of cargo through its enactment of the FAAAA in 1994. The FAAAA was designed "to as completely as possible level the playing field between air carriers on the one hand and motor carriers on the other with respect to intrastate economic trucking regulations." *Id.* at 82.[3] Section 601 of the FAAAA, entitled "Preemption of Intrastate Transportation of Property," addresses air and motor carriers in two companion preemption provisions. Section 601(b) added a new air carrier preemption provision, 49 U.S.C. § 41713(b)(4), which preempts State and local laws "related to a price, route, or service" of "an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle."[4] FAAAA § 601(b), 108 Stat. at 1605. Section 601(c)

[3] *See also* H.R. Conf. Rep. No. 103-677, at 88 ("it is clear that all air carriers and carriers affiliated with a direct air carrier through common controlling ownership, motor carriers and motor private carriers involved in the transportation of property are covered by the preemption").

[4] Upon enactment of the FAAAA, air carriers of property were no longer covered by the ADA, but instead became subject to the FAAAA's new air carrier preemption provision, Section 41713(b)(4)(A), which also applies to intermodal air/motor carriers. Even after the effective date of the FAAAA, however, some courts have continued to apply ADA preemption to air cargo carriers. *See, e.g., Read-Rite Corp. v. Burlington*

added a motor carrier preemption provision, currently codified as amended at 49 U.S.C. § 14501(c), which preempts State and local laws "related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property."[5] *Id.* § 601(c), 108 Stat. at 1606.

The FAAAA's two preemption provisions were designed to eliminate for all cargo carriers the "patchwork of regulation" that State law had previously imposed on motor and intermodal air/motor cargo carriers. H.R. Conf. Rep. No. 103-677, at 87. Section 601 of the FAAAA includes Congress's express findings that State regulation of motor cargo carriers had "imposed an unreasonable burden on interstate commerce [and] impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA § 601(a)(1), 108 Stat. at 1605. As explained by the House Conference Committee Report, FAAAA preemption was "necessary to facilitate interstate commerce" because:

> State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . .

Air Express, Ltd., 186 F.3d 1190, 1197 (9th Cir. 1999) ("state law regulating the scope of air carrier liability for loss or damage to cargo is preempted by the ADA"). Nonetheless, by its express terms, it is the air carrier preemption provision of the FAAAA that applies whenever an air carrier "is transporting property by aircraft or by motor vehicle." 49 U.S.C. § 41713(b)(4)(A).

[5] The motor cargo carrier preemption provision of the FAAAA was originally codified as 49 U.S.C. § 11501(h) (1994), and was recodified as Section 14501(c) as part of the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803, discussed *infra* at pp. 11-12.

> *The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.*

H.R. Conf. Rep. No. 103-677, at 87 (emphasis added).

To accomplish these goals, Congress used the same preemptive language as in the ADA, *see supra*, p. 5 & n.2, defining the preempted State and local laws as those "related to a price, route, or service" of air, motor, or intermodal carriers of property. Congress also expressly incorporated "the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. [374 (1992)]." H.R. Conf. Rep. No. 103-677, at 83. Interpreting the ADA, the *Morales* Court had concluded that "[t]he ordinary meaning of ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,'—and the words thus express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation omitted). Based on that ordinary meaning, as well as cases interpreting the "relates to" language of the ERISA preemption provision, the Court had held that "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted" by the ADA. *Id.* at 384.[6] The *Morales* Court

[6] Subsequent to *Morales*, the broad interpretation of the "relates to" language in the ERISA preemption provision on which the *Morales* Court relied has been criticized. *See, e.g., Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (Supreme Court's "first take on [ERISA] was wrong"). Regardless of subsequent developments in ERISA preemption cases, however, Congress intended to incorporate into the FAAAA "the broad preemption interpretation" described in the *Morales* opinion. H.R. Conf. Rep. No. 103-677, at 83. Congress's choice to adopt *Morales* as the scope of FAAAA preemption must be honored, even if this Court ultimately determines that the scope of preemption recognized in *Morales* was too broad under ERISA or the ADA. In evaluating legislative intent, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was," even if "that understanding of Congress was in some ultimate sense incorrect." *Brown v. General Services Admin.*, 425 U.S. 820, 828 (1976).

had also concluded that application to air carriers of such generally applicable laws as those against prostitution and gambling would not be preempted by the ADA because their connection to airline price, route, or service was too "'tenuous, remote, or peripheral'" to trigger preemption. *Id.* at 390 (citation omitted).

At the same time that Congress placed that broad preemption language in the FAAAA, it also included in each preemption provision a subsection entitled "Matters Not Covered." Congress there provided, in relevant part, that the preemption rule

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization[.]

FAAAA sec. 601(b), (c), §§ 41713(b)(4)(B)(i) & 11501(h)(2)(A), 108 Stat. at 1605-06 (codified as amended at 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i)).

Congress specifically identified each of the four matters listed in the "Matters Not Covered" sections quoted above because each was, and is, the subject of a statutory grant of congressional authority to permit State regulation within defined limits. *See* 49 U.S.C. § 5125 (transportation of hazardous cargo), § 14504 (minimum amounts of financial responsibility related to insurance), §§ 31111-31113 (restrictions on size of motor vehicles), § 30103(b) (motor

vehicle safety standards), §§ 31131-31147 (commercial motor vehicle safety). Congress used the "Matters Not Covered" to clarify that the authority granted by those other statutes was not repealed by the FAAAA. Importantly, however, Congress explicitly rejected the idea that States could use the authority preserved by the "Matters Not Covered" to regulate price, route, or service:

> There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. *The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.*

H.R. Conf. Rep. No. 103-677, at 84 (emphasis added).

Congress further demonstrated its intent to ensure that the unaffected areas of State authority enumerated in the "Matters Not Covered" not be used to regulate cargo carriers' price, route, or service by declaring that "State regulation in those areas is not a price, route or service and thus is unaffected." *Id.* at 84.[7]

---

[7] *See also* H.R. Conf. Rep. No. 103-677, at 84 ("[t]his list is not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, [routes] or services' and which are therefore not preempted"); *id.* at 85 ("State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected"). Congress's inclusion of the second clause of Section 14501(c)(2)(A), addressing vehicle size, weight, and hazardous materials routing on State highways, as a matter that does not relate to "price, route, or service" is not further explained in the House Conference Report. Congress presumably intended that only State laws regulating motor carrier routing based on factors other than size, weight, or hazardous cargo relate to a "route" of a motor cargo carrier within the meaning of the FAAAA's general preemption rules.

C. The ICC Termination Act's Amendment Of The FAAAA To Permit Rate Regulation Of Non-Consensual Towing

The legislative history of the FAAAA contains no references to the tow truck industry, which, in contrast to the "national and regional carriers" addressed in the House Conference Report (H.R. Conf. Rep. No. 103-677, at 87), has been described as "widely used for transportation [of vehicles] within a single city or municipality." *Amicus Curiae* Miami-Dade County Br. in Supp. of Pet'r ("Miami-Dade Br.") at 7. Congress first specifically referenced tow truck operators in the FAAAA preemption provisions in 1995, when it enacted the ICC Termination Act. In addition to eliminating the ICC,[8] that Act recodified the motor carrier preemption provision of the FAAAA as 49 U.S.C. § 14501(c), and added a new subsection to the "Matters Not Covered" section, which provides that the preemption also

> does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation,

---

[8] Through deregulation, Congress did not abandon federal supremacy in regulating interstate cargo transportation, or leave regulation to a patchwork quilt of innumerable sets of State and local legislative, administrative, and judicial standards. Rather, Congress reaffirmed its intent that motor carriers continue to be governed by uniform, federal rules:

> Since motor carrier transportation is a truly interstate industry, *it is critical to the smooth functioning of commerce that there be Federal commercial rules established to ensure that all interstate transportation is subject to the same rules and procedures. Otherwise, a motor carrier would be potentially subject to 50 different rules for operation.*

H.R. Rep. No. 104-311, at 85 (emphasis added).

> or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

ICC Termination Act, sec. 103, § 14501(c)(2)(C), 109 Stat. at 899 (codified at 49 U.S.C. § 14501(c)(2)(C) (Supp. V 1999)).[9] Since enactment of the ICC Termination Act, lower courts generally have held that tow truck operators are motor carriers of property within the scope of the FAAAA. *See, e.g., A&A Wrecker Serv. v. City of Galveston*, No. G95-111, 1996 U.S. Dist. LEXIS 21513, at *15 (S.D. Tex. June 10, 1996).[10]

D. Requests To Congress To Re-Regulate Tow Truck Operators

Since the FAAAA was first enacted, Congress repeatedly has been asked to exempt tow truck operators from the scope of preemption, but has rejected such requests.[11] For

[9] Unlike the "Matters Not Covered" described in the House Conference Report as "matters which are not 'prices, rates or services' and which are therefore not preempted" (H.R. Conf. Rep. No. 103-677, at 84), Section 14501(c)(2)(C), added by the ICC Termination Act, plainly does address price. The addition of Section 14501(c)(2)(C), however, does not alter Congress's description of the "Matters Not Covered" in Section 14501(c)(2)(A) as matters that "are not 'prices, rates or services'"; nor does it change Congress's explicit intent to prohibit the States from "attempting to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority" set forth in Section 14501(c)(2)(A). H.R. Conf. Rep. No. 103-677, at 84.

[10] *Amicus Curiae* Miami-Dade County argues that Congress's Commerce Clause powers do not permit preemption of purely local towing operations. Miami-Dade Br. at 5-9. Because it is unquestioned that Congress has authority to preempt State and local laws related to the price, route, or service of the air and intermodal air/motor cargo carriers that are members of *Amicus* CAA, it takes no position on that argument.

[11] Almost immediately upon enactment of the FAAAA, bills were introduced in both the House and the Senate to amend the Act so that it would not apply to tow truck operators. *See, e.g.*, Intrastate Motor Carrier Transportation Technical Corrections Act of 1994, S. 2454, 103rd Cong. (1994); Intrastate Tow and Wrecker Truck Transportation Technical Correction Act of 1994, H.R. 5123, 103rd Cong. (1994) (version 3, introduced Nov. 30, 1994). Similar bills were also introduced in 1995. *See, e.g.*, S. 1368, 104th Cong. (1995) (amending FAAAA so that it would "not apply to the provision of tow or wrecker services"). In 2000, another bill was introduced, H.R. 4955, 106th Cong. (2000), to "restore full state and local authority over all aspects of tow truck operations." 146 Cong. Rec. 1321 (2000) (statement of Rep. Moran). None of these bills was enacted.

example, when amending the FAAAA to add 49 U.S.C. § 14501(c)(2)(C), permitting States and local governments to enforce laws relating to the price of non-consensual tows, Congress "had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services." H.R. Rep. No. 104-311, at 120. Congress made a policy choice *not* to re-regulate, and instead "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services." *Id.*

E. The Regulations At Issue

The challenged regulations, Chapter 549 of the Columbus, Ohio Business Regulation & Licensing Code, entitled "Tow Trucks," expressly regulate the manner in which tow truck operators are permitted to provide service. *See* Pet. App. 36A-47A. The regulations dictate the circumstances in which tow truck operators are permitted to solicit business at an accident scene and prohibit them from towing vehicles picked up within the City unless they have obtained a local license. *Id.* at 37A-38A, 40A (§§ 549.02, 549.065). The regulations also require that tow truck operators maintain and show proof of liability insurance above specified minimum amounts, obtain City approval of the "trade name, design, color scheme or method of painting or lettering" of tow trucks, and maintain certain records. *Id.* at 44A-47A (§§ 549.14-549.16, 549.18).

Petitioner City of Columbus "does not dispute that its towing regulations relate to the price, route, or service of tow trucks, and therefore are encompassed by the general rule of preemption found in 49 U.S.C. § 14501(c)." Appellants' Final Reply Br., *Ours Garage & Wrecker Serv. v. City of Columbus*, No. 00-3409 (6th Cir. filed Aug. 22, 2000) ("Appellants' Reply Br.") at 1.

SUMMARY OF ARGUMENT

I. Petitioners and their *amici* fail to distinguish between local laws, including safety regulations, that relate to a carrier's price, route, or service, and those that do not. That distinction is critical. By its plain terms, the FAAAA preempts only those State and local laws that are "related to a price, route, or service" of an air, motor, or intermodal air/motor carrier of property. The FAAAA has no effect whatsoever on laws that do not relate to a carrier's price, route, or service, such as generally applicable traffic laws and other safety regulations governing safe operation of motor vehicles. Such laws are too remote from regulation of prices, routes, or services of cargo carriers to trigger preemption. *See Morales*, 504 U.S. at 390. Thus, contrary to the arguments of petitioners and their *amici*, FAAAA preemption does not prevent enforcement of local traffic laws and other safety regulations that do not relate to cargo carriers' price, route, or service. Enforcement of those laws addresses petitioners' safety concerns.

Although FAAAA preemption does not interfere with local safety, petitioners' proffered interpretation of the FAAAA as permitting enforcement of local safety regulations that relate to cargo carriers' price, route, or service would interfere with interstate commerce. FAAAA preemption applies to all cargo carriers, not merely tow truck operators. Permitting local governments throughout the country to enforce safety regulations related to cargo carriers' price, route, or service—such as petitioners' regulations requiring carriers to obtain a

local license and obtain local approval of their trade name and the color and design of their vehicles—would resurrect the very impediments to national and regional cargo carriers that Congress intended to preempt. Whether Congress has legislated wisely in including tow trucks in FAAAA preemption, and in declining requests to allow local governments to re-regulate the tow truck industry, is not a matter for the courts to decide.

II. In the course of deciding the question presented, which addresses whether the FAAAA permits States to delegate to municipalities whatever "safety regulatory authority of a State with respect to motor vehicles" may be preserved by the FAAAA, this Court need not, and should not, determine the scope of the States' authority to enforce safety regulations that fall within the FAAAA's general rule of preemption. The district court and court of appeals did not address the extent of the authority preserved by Section 14501(c)(2)(A). Instead, those courts addressed whether Section 14501(c)(2)(A) permits delegation; having concluded that it does not, they held that the FAAAA preempts petitioners' regulations, which petitioners concede fall within the FAAAA's general preemption rules.

The extent of State authority to enforce safety regulations related to the price, route, or service of cargo carriers is an important question with potentially dramatic consequences for the national and regional carriers that Congress intended to benefit from FAAAA preemption. While petitioners' arguments here are premised on the *assumption* that States have authority to enforce safety regulations that relate to the price, route, or service of carriers covered by the FAAAA preemption, Congress made clear that it did *not* intend for States "to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." H.R. Conf. Rep. No. 103-677, at 84. The limited nature of State regulatory

authority over "commercial motor vehicle safety"—which extends only to enforcement of accident-prevention regulations that apply to *all* commercial motor carriers, including passenger carriers—contradicts petitioners' assumptions about the broad scope of the State safety authority preserved by the FAAAA. In addition, petitioners' assumptions about the scope of State safety authority are inconsistent with the federal "single-State registration system," which permits only a single registration State—not multiple States or municipalities—to impose the minimum insurance requirements that petitioners seek to enforce via the "safety regulatory authority of a State with respect to motor vehicles."

This issue of crucial importance to interstate cargo carriers such as *Amicus* CAA's members is far too important to be decided based on petitioners' unchallenged assumptions. A determination of the scope of the States' "safety regulatory authority of a State with respect to motor vehicles" preserved by the FAAAA, which was not addressed by the courts below and is not presented by the petition, should await resolution until it is squarely presented to the Court.

ARGUMENT

I. THE FAAAA DOES NOT PREEMPT STATE OR LOCAL TRAFFIC LAWS OR OTHER GENERALLY APPLICABLE SAFETY REGULATIONS THAT DO NOT RELATE TO THE PRICE, ROUTE, OR SERVICE OF CARRIERS OF PROPERTY.

Petitioners and their *amici* paint a bleak picture of the world that purportedly would exist if FAAAA preemption were applied to local safety regulations. For example, petitioners claim that "even municipal one-way-street laws would be preempted" (Pet'rs Br. at 28), while the United States argues that local governments would be "divest[ed] . . . of any role in the furtherance of motor carrier safety" and

"categorically foreclosed from regulating commercial motor carrier safety" (*Amicus Curiae* United States Br. in Supp. of Pet'rs ("United States Br.") at 2, 10).[12]

The reality is far different. FAAAA preemption applies only to State and local laws that are "related to a price, route, or service" of an air, motor, or intermodal air/motor carrier of property. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). By its plain terms, the Act has no effect at all on the myriad State and local laws that do not relate to cargo carriers' price, route, or service, or State delegation of authority to enforce such laws. The argument that FAAAA preemption threatens enforcement of local traffic laws and other generally applicable safety regulations that do not relate to carriers' price, route, or service is unfounded.

---

[12] In claiming a presumption against preemption (United States Br. at 15), the United States fails to address *United States v. Locke*, 529 U.S. 89, 108 (2000), in which this Court held that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." There is precisely such a history of federal presence in the field of transporting property in, or affecting, interstate commerce. *See, e.g., Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06 (1913); *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir. 1978) ("Congress has created a broad, comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. This has occupied the field to the exclusion of state law."). Because tow truck operators are considered to be motor carriers of property within the scope of the FAAAA, Congress's history of "significant federal presence" with respect to motor carriers of property supports application of the *Locke* rationale here. If this Court were to conclude that the history of local regulation of tow truck operators (*see* Pet'rs Br. at 2-7) supports application of a presumption against preemption in this context, *Amicus* CAA would respectfully request that any such ruling be limited to tow truck operators and not be made applicable to other carriers of property covered by FAAAA preemption.

This Court rejected similar arguments in *Morales*, holding that the expansive interpretation of the "relate to" language in the Airline Deregulation Act preemption provision adopted in that case would not

> set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw*, "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect.

504 U.S. at 390 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)) (alterations in original). Applying *Morales*, lower courts have adopted a common sense approach to preemption of generally applicable State laws. For example, the Fifth Circuit held that a State statute creating a damage claim for retaliatory firing was "far too remote to trigger preemption" under the ADA. *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 597 (5th Cir. 1993). Similarly, courts have held that such generally applicable State laws as employment discrimination statutes, *see, e.g., Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493, 495 (6th Cir. 1999), disability discrimination laws, *see Aloha Islandair, Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997), and unemployment laws, *see Western Ports Transp., Inc. v. Employment Sec. Dep't*, No. 48294-7-I, 2002 Wash. App. LEXIS 347, at *22-23 (Wash. App. Mar. 4, 2002), have too tenuous a connection to price, route, or service to trigger preemption under the ADA or FAAAA.

Consistent with Congress's intent given its understanding of *Morales*, *see supra*, p. 8, it is clear that State and local governments can (and routinely do) enforce laws of general applicability regulating the operation of motor vehicles by

both air and motor carriers covered by FAAAA preemption. Thus, they enforce safety regulations regarding one-way street laws, speed limits, and prohibitions against reckless driving or unsafe operation of a vehicle. State and local regulation of motor vehicles through such laws affect price, route, or service "'in too tenuous, remote, or peripheral a manner, to have pre-emptive effect.'" *Morales*, 504 U.S. at 390 (citation omitted).

Contrary to the arguments of petitioners and their *amici*, FAAAA preemption does not interfere with local safety. According to *Amicus Curiae* City of Dallas, tow trucks that race to the scene of an accident "invariably violate the traffic ordinances of the City and greatly interfere with and obstruct traffic, both en route and upon arrival at the scene of the wreck." *Amicus Curiae* City of Dallas Br. in Supp. of Pet'rs at 1-2. By conceding that the conduct that concerns local officials is addressed by generally applicable traffic laws, the City of Dallas implicitly acknowledges that enforcement of those laws would address its safety concerns.[13]

In fact, it is the position advanced by petitioners—not application of FAAAA preemption—that would create problems. Because the FAAAA applies to all motor, air, and intermodal carriers of property, petitioners' theory that local governments may enforce safety regulations related to the price, route, or service of such carriers could expose interstate cargo carriers, including *Amicus* CAA's members, to

---

[13] Even beyond enforcing traffic laws, petitioners have other means of combating the practice of tow trucks racing to the scene of an accident. As respondents point out (Br. for Resp'ts in Opp'n at 6-7), numerous courts have held that a local government acts as a "municipal proprietor" in contracting with tow truck operators to remove cars from accident scenes and that FAAAA preemption therefore does not apply to rotational towing programs and other measures to combat tow truck "chasing." *See, e.g., Petrey v. City of Toledo*, 246 F.3d 548, 555-59 (6th Cir. 2001), *reprinted in* Pet. App. 13A-20A.

comparable restrictions. For example, petitioners require, among other things, that tow truck operators obtain City approval of the "trade name, design, color scheme or method of painting or lettering" of tow trucks as well as a local license in order to pick up vehicles with the City limits, and also dictate when and how tow truck operators may solicit business. *See* Pet. App. 37A-38A, 40A, 45A-46A (§§ 549.02, 549.065, 549.16).[14] If the FAAAA were interpreted to permit such laws to be enforced against interstate cargo carriers covered by the Act, then national and regional carriers would have to obtain local licenses and local approval of their trade names and the design and color scheme of their delivery vehicles, and obey local restrictions on their manner of soliciting business in order to provide service in any municipality that chose to enact and enforce such regulations. Interstate carriers would be forced to satisfy the varying and potentially conflicting requirements of every municipality that enacted safety regulations that related to their price, route, or service, and/or design their routes to avoid locations in which they were not licensed or that imposed particularly unfavorable restrictions. *Cf.* H.R. Conf. Rep. No. 103-677, at 87-88 (harm to interstate commerce arising from State regulation included that "small package express . . . companies frequently ship[ped] goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments").

Congress did not intend local governments to dictate which national and regional cargo carriers would be permitted to

[14] There is a potentially infinite list of restrictions on carriers' prices, routes, and services that could be imposed in the name of safety. For example, Miami-Dade County invokes safety authority to regulate "abusive practices" and "exploitation" of the public by tow truck operators (*see* Miami-Dade County Br. at 1, 2), and San Francisco requires tow truck operators to accept cash, checks, and credit cards (*see Amici Curiae* City & County of San Francisco, *et al.* Br. in Supp. of Pet'r ("San Francisco Br.") at 10).

make pick-ups or deliveries, the manner in which carriers solicit business, or the trade names and trade dress of the delivery vehicles that they use; nor did Congress intend otherwise to permit local governments to enforce safety regulations related to cargo carriers' price, route, or service. State and local enforcement of such laws would defeat Congress's declared intent to remove impediments to cargo carriers attempting to provide uniform services across States, regions, and throughout the nation. Congress has already determined that State regulation of intrastate price, route, or service of motor carriers of property "*imposed an unreasonable burden on interstate commerce* [and] impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA § 601(a)(1), 108 Stat. at 1605 (emphasis added). Resurrecting a patchwork quilt of varying and conflicting regulation of cargo carriers, this time at the local level, not only would contradict Congress's express intent to preempt such laws, it would create burdens on interstate commerce that Congress explicitly has found to be unreasonable. *Id. See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (burdens imposed on interstate commerce must be assessed "not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation").[15]

[15] *Amicus* CAA takes no position on the constitutionality of local safety laws relating to price, route, or service that are enforced solely against purely local carriers that provide services only within the locality's boundaries. However, application of such laws to interstate carriers, such as the CAA's members, would impermissibly burden interstate commerce, even if they applied solely to transportation taking place entirely within city limits. National and regional carriers would have to identify packages travelling locally, treat those packages differently than other packages, comply with varying and possibly inconsistent local regulations, and potentially route packages in a manner dictated by the need to avoid

It is no answer to the grave problems presented by local enforcement of safety regulations related to the price, route, or service of carriers covered by the FAAAA to argue that public safety is best served through local governments' enacting and enforcing laws that specifically regulate tow truck operators. *See, e.g.*, San Francisco Br. at 9-10. Regardless of the wisdom of its choice, Congress has included tow truck operators within the scope of motor carriers of property covered by the FAAAA preemption rules (with the sole exception of local regulation of the price of non-consensual tows) and has repeatedly rejected requests to re-regulate the tow truck industry. *See supra*, pp. 12-13 & n.11. Petitioners' dissatisfaction with Congress's preemption policy is a legislative matter properly addressed to Congress, not the courts.

II. THE QUESTION OF THE PROPER SCOPE OF STATE AUTHORITY TO ENFORCE SAFETY REGULATIONS RELATED TO CARGO CARRIERS' PRICE, ROUTE, OR SERVICE HAS NOT BEEN PRESENTED TO THE COURT AND SHOULD NOT BE DECIDED AT THIS TIME.

No real question exists that petitioners' challenged regulations are "related to a price, route, or service" of tow truck operators and therefore fall within the FAAAA's motor carrier preemption provision set forth in 49 U.S.C. § 14501(c)(1), as petitioners conceded below. *See* Appellants' Reply Br. at 1. Chapter 549 of the City of Columbus Code, entitled "Tow Trucks," expressly regulates which tow truck operators are permitted to perform certain services for vehicles picked up within the City and the manner in which those services are performed. *See, e.g.*, Pet. App. 37A-38A,

cumbersome restrictions rather than based on efficiency. This is precisely the type of patchwork of regulation that Congress found to be an unreasonable burden on interstate commerce. *See* H.R. Conf. Rep. No. 103-677, at 87-88.

40A (§ 549.02 (licensing requirements), § 549.065 (prohibiting solicitation at accident scenes)). The regulations' "express reference" to carriers' service is sufficient in and of itself to satisfy the *Morales* standard for relating to price, route, or service. *See Morales*, 504 U.S. at 388.[16] In addition, by controlling which carriers may perform services and under what terms, the regulations also have a "forbidden significant effect" on service. *Id.*; *see R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545 (11th Cir. 1998) (FAAAA preempts local licensing ordinances because they "limit who is permitted to provide the services and require that individuals and companies satisfy various criteria before they provide the services").[17]

Petitioners contend (Pet'rs Br. at 16-20) that they may nevertheless enforce the challenged regulations because States are authorized to delegate "the safety regulatory authority of a State with respect to motor vehicles" that is preserved by the "Matters Not Covered" section of the FAAAA motor carrier preemption provision. 49 U.S.C.

[16] Even if the Court's more recent ERISA authorities—rather than the *Morales* standard specified by Congress—were applied, the result would be the same. *See Dillingham*, 519 U.S. at 324-25 (law "relates to" an ERISA plan if it has a "*reference* to such a plan," either by "act[ing] immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation" (emphasis added; internal quotation marks omitted)); *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992) (striking down law that "specifically refers to welfare benefit plans regulated by ERISA *and on that basis alone is pre-empted*" (emphasis added)).

[17] *Amicus Curiae* Miami-Dade County's assertion that licensing requirements do not relate to carriers' price, route, or service because they do not "restrict the actual route of a tower or limit the type of service the tower can perform" (Miami-Dade Br. at 16-17) ignores both petitioners' admission that the licensing and other regulations at issue do in fact relate to price, route, or service, and the fact that licensing requirements determine which tow truck operators are allowed to provide service. *See R. Mayer*, 158 F.3d at 545.

§ 14501(c)(2)(A); *see also* 49 U.S.C. § 41713(b)(4)(B)(i) (parallel section in FAAAA air carrier preemption provision). The argument rests on the unstated premise that States are permitted to enact and enforce safety regulations that are related to carriers' price, route, or service, and *focuses exclusively on the ability of States to delegate that authority.* Similarly, the district court and court of appeals below addressed only the issue of whether the FAAAA permits States to delegate the safety authority preserved by Section 14501(c)(2)(A), *not the scope of that authority. See* Pet. App. 1A-2A (citing *Petrey*, 246 F.3d at 548, 555, 558-59, 564), 33A-35A; *see also Petrey*, 246 F.3d at 559-64, *reprinted in* Pet. App. 21A-29A.

Amicus CAA respectfully requests that the Court avoid resolution of the scope of the "safety regulatory authority of a State with respect to motor vehicles" preserved by Section 14501(c)(2)(A) until such time that it is squarely presented to the Court. The question of the proper scope of the States' authority to enforce safety regulations related to cargo carriers' price, route, or service is one of great importance to *Amicus* CAA's members. The types of safety regulations that petitioners seek to enforce at a local level, addressing even such matters as carriers' trade names and their delivery vehicles' trade dress, would have dramatic adverse effects on interstate cargo carriers even if enacted on a State level. The resurrection of a patchwork of fifty States' laws related to cargo carriers' price, route, or service—whether or not those laws are designed to promote safety—would reinstate impediments to national and regional carriers attempting to conduct a standard way of doing business and the attendant burdens on interstate commerce that Congress intended to eliminate through FAAAA preemption.

Although petitioners *assume* that the States may enforce such laws, Congress did not intend the "Matters Not Covered" to swallow the general preemption rule. On the contrary, Congress explicitly considered, and rejected, the

idea that States could invoke their "unaffected authority to regulate matters such as safety" to regulate carriers' price, route, or service: *"The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority."* H.R. Conf. Rep. No. 103-677, at 84 (emphasis added); *see supra*, pp. 9-10.

As shown below, petitioners' assumptions about the broad scope of State authority to enforce safety regulations related to the price, route, or service of cargo carriers covered by FAAAA preemption are inconsistent with the limited nature of the "safety regulatory authority of a State with respect to motor vehicles" preserved by the "Matters Not Covered" sections of the FAAAA. State authority over "commercial motor vehicle safety" is limited to enforcement of accident-prevention safety regulations that apply to *all* commercial motor carriers; it does not encompass enforcement of laws that dictate the manner in which motor carriers of property, or particular types of carriers, are permitted to provide service. Petitioners' assumptions about the broad State safety authority preserved by the FAAAA also are inconsistent with the federal single-State registration system, which allows only a single registration State, not multiple States or municipalities, to impose the minimum insurance requirements that petitioners assume are within the "safety regulatory authority of a State with respect to motor vehicles."

A. Petitioners' Assumptions About The Broad Scope Of The Preserved "Safety Regulatory Authority Of A State With Respect To Motor Vehicles" Are Inconsistent With Federal Laws Limiting State Regulatory Authority Over Commercial Motor Vehicle Safety To Enforcement Of Accident-Prevention Laws That Apply To *All* Commercial Motor Carriers.

As the United States acknowledges (United States Br. at 18), the Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832, prohibits State enforcement of any "commercial motor vehicle safety" laws that the Secretary of Transportation determines may not be enforced.[18] *See* 49 U.S.C. § 31141(a) (1994). Regulations promulgated pursuant to Section 31141 prohibit enforcement of State laws found to be "incompatible" with federal safety regulations. 49 C.F.R. § 355.25(a) (2001). To be compatible with federal regulations, and therefore enforceable, a "State law or regulation *must apply to all segments of the motor carrier industry* (*i.e.*, for-hire and private motor carriers of property and passengers)." 49 C.F.R. § 350.333(a) (2001); *see* 49 C.F.R. Pt. 355, app. A (2001) (same).

Congress uses the term "commercial motor vehicle safety" in that Act to address harm to persons and property caused by motor vehicle accidents, expressly finding that:

> (1) it is in the public interest to enhance commercial motor vehicle safety and *thereby reduce highway fatalities, injuries, and property damage*;

[18] The United States concedes that the Secretary has no rulemaking authority under the FAAAA (United States Br. at 27); accordingly, Department of Transportation memoranda addressing the FAAAA's preemptive scope (*id.* at 25-26) "lack the force of law" and are not entitled to *Chevron*-deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

> (2) improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would *reduce the number of fatalities and injuries and the level of property damage* related to commercial motor vehicle operations . . . .

49 U.S.C. § 31131(b)(1), (2) (1994) (emphases added).[19] The Senate Report accompanying the Motor Carrier Safety Act illustrated "the magnitude of the motor carrier safety problem" addressed by the Act through tables reporting accidents, injuries, property damage, and accident and fatality rates for both motor carriers of property and motor carriers of passengers. S. Rep. No. 98-424, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4785, 4786. As shown by the Act's findings and legislative history, Congress's purpose of "promot[ing] the safe operation of commercial motor vehicles," 49 U.S.C. § 31131(a)(1) (1994), refers to reducing motor vehicle accidents and the harms they cause.[20]

Thus, State authority with respect to commercial motor vehicle safety is limited to enforcement of safety regulations that address the prevention of accidents in the motor carrier industry generally, and that apply to all commercial motor

[19] The only definition of "motor vehicle safety" anywhere in Title 49 is found in Chapter 301, which is titled "Motor Vehicle Safety." It also addresses the prevention of motor vehicle accidents, defining "motor vehicle safety" as:

> [T]he performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.

49 U.S.C. § 30102(a)(8) (1994).

[20] The Motor Carrier Safety Assistance Program ("MCSAP"), a voluntary grant program for States (*see* United States Br. at 19-21), shares this same goal: "to reduce [commercial motor vehicle]-involved accidents, fatalities, and injuries through consistent, uniform and effective [commercial motor vehicle] safety programs." 49 C.F.R. § 350.101 (2001).

carriers, whether they carry property or passengers. States are prohibited from enforcing commercial motor vehicle safety regulations that target specific segments of the motor carrier industry, such as motor carriers of property or tow truck operators.[21]

That approach is fully consistent with the broad scope of preemption that Congress intended for the FAAAA. Safety regulations that apply to *all* commercial motor carriers, like generally applicable traffic laws, are likely to have only a "'tenuous, remote, or peripheral'" connection to the price, route, or service of cargo carriers. *See Morales*, 504 U.S. at 390 (citation omitted). In contrast, safety regulations that target some or all motor carriers of property are proscribed not only by the Motor Carrier Safety Act but also by the FAAAA, because laws that make "express reference" to the services of such carriers are preempted. *See id.* at 388. States do not have authority to enact or enforce such laws.[22]

---

[21] Although the Motor Carrier Safety Act addresses motor *carrier* safety, the scope of the State authority granted by that Act is limited to addressing motor *vehicle* accidents. The State safety authority preserved by the FAAAA is similarly that "with respect to motor *vehicles*," although Congress used the term "motor *carriers*" in the same sentence, when preserving State authority to "regulate motor *carriers*" with respect to minimum amounts of insurance. 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i) (emphases added). The general rule of preemption in the FAAAA motor carrier provision, Section 14501(c)(1), also refers to motor *carriers*. When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Rusello v. United States*, 464 U.S. 16, 23 (1983). Congress's intentional selection of the term "motor vehicles" in discussing the State regulatory authority preserved by the FAAAA therefore cannot be interpreted to permit States to enforce safety laws regulating the price, route, or service of motor carriers.

[22] Petitioners' assumptions about the broad scope of State safety regulatory authority would also render superfluous Congress's inclusion of highway route controls in the "Matters Not Covered" sections of the

B. Petitioners' Assumptions About The Broad Scope Of The Preserved "Safety Regulatory Authority Of A State With Respect To Motor Vehicles" Also Are Inconsistent With The Federal Single-State Registration System.

The federal framework governing State registration of motor carriers of property further contradicts petitioners' assumptions about the broad "safety regulatory authority of a State with respect to motor vehicles." Through 49 U.S.C. § 14504, Congress directed the Secretary of Transportation to implement a "single State registration system," through which a motor carrier is required to register with only one State. *See* 49 U.S.C. § 14504(c). Congress has mandated that "only a State acting in its capacity as registration State under such single State system may require a motor carrier" to "file satisfactory proof of required insurance or qualification as a self-insurer." 49 U.S.C. § 14504(c)(2)(A)(ii). Compliance with the single-State registration system is the sole avenue for State registration of interstate carriers; any State registration requirement that imposes additional obligations is considered "an unreasonable burden" on interstate commerce. 49 U.S.C. § 14504(b).

The Single-state registration system plainly forbids multiple States, much less thousands of municipalities, to impose additional insurance requirements on motor carriers of property. Petitioners' invocation of State safety authority to impose liability insurance requirements on motor carriers of property (Pet. App. 44A-45A (§ 549.14)) is inconsistent with that federal framework.

FAAAA, 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i). If the safety authority preserved by the "Matters Not Covered" encompassed all safety regulations, then the separate enumeration of route controls, which have a connection to safety, would have been unnecessary. *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 306 (Tex. App. Dallas 2001).

Thus, petitioners' assumptions about the broad scope of State safety authority preserved by Section 14501(c)(2)(A) are fatally flawed. Because this issue is of such importance to interstate cargo carriers, was neither briefed to nor addressed by the courts below or this Court, and is not presented by the writ petition, *Amicus* CAA respectfully requests that the Court defer resolution of the scope of the "safety regulatory authority of a State with respect to motor vehicles" preserved by Section 14501(c)(2)(A) until such time that it is squarely presented to the Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DREW S. DAYS III
BETH S. BRINKMANN
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
(202) 887-1500

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN *
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-7000

* Counsel of Record

Counsel for *Amicus Curiae* Cargo Airline Association

March, 2002

Supreme Court, U.S.
FILED
MAR 21 2002
CLERK

No. 01-419

In the Supreme Court of the United States

CITY OF COLUMBUS, MITCHELL BROWN, and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE CALIFORNIA TRUCKING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

BETH L. LAW
ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
703-838-1865

EVAN M. TAGER
Counsel of Record
RICHARD B. KATSKEE
Mayer, Brown, Rowe & Maw
1909 K St., N.W.
Washington, D.C. 20006
202-263-3000

Counsel for Amici Curiae

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

The question as stated by petitioners is whether political subdivisions have the authority to regulate tow truck safety under 49 U.S.C. § 14501(c)(2)(A). But Section 14501 is not a statute solely about tow trucks. Rather, it covers the motor carrier industry as a whole, broadly preempting trucking regulations by States, political subdivisions, and political authorities of 2 or more states subject to a specially enumerated exception for "the safety regulatory authority of a State with respect to motor vehicles." Accordingly, the question actually presented by this case is whether Section 14501's preservation of limited safety regulatory authority of States, as part of a systematic program of motor carrier deregulation, affords political subdivisions and other non-State governmental entities power to regulate trucks and trucking.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

A. The Rise And Decline Of Motor Carrier Regulation 4

B. In Enacting Section 14501(c)(2)(A), Congress Had Good Reason To Distinguish Between States And Political Subdivisions 21

C. Failure To Apply Section 14501(c)(2)(A) As Written Will Harm The Motor Carrier Industry And Inhibit Interstate Commerce 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 12

Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) 13, 22

Buck v. *Kuykendall*, 267 U.S. 307 (1925) 9

California Dump Truck Owners Ass'n v. *Davis*, 172 F. Supp. 2d 1298 (E.D. Cal. 2001) 2, 3, 4, 26

Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949) 18

Federal Express Corp. v. *California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991) 20

Frost v. *Railroad Comm'n*, 271 U.S. 583 (1926) 9

George W. Bush & Sons Co. v. *Maloy*, 267 U.S. 317 (1925) 9, 10

H.P. Welch Co. v. *New Hampshire*, 306 U.S. 79 (1939) 13, 14

Kassel v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) 13, 22

Maurer v. *Hamilton*, 309 U.S. 598 (1940) 13, 14

Michigan Pub. Utils. Comm'n v. *Duke*, 266 U.S. 570 (1925) 8, 9, 10

Minnesota Rate Cases, 230 U.S. 352 (1913) 11

Morris v. *Duby*, 274 U.S. 135 (1927) 11

TABLE OF AUTHORITIES — Continued

Page

R. Mayer of Atlanta, Inc. v. *City of Atlanta*, 158 F.3d 538 (11th Cir. 1998) 4, 19, 23

Raymond Motor Transp., Inc. v. *Rice*, 434 U.S. 429 (1978) 13, 22

Smith v. *Cahoon*, 283 U.S. 553 (1931) 9

Sproles v. *Binford*, 286 U.S. 374 (1932) 10

Stephenson v. *Binford*, 287 U.S. 251 (1932) 10

Tocher v. *City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000) ..... *passim*

Wisconsin Pub. Intervenor v. *Mortier*, 501 U.S. 597 (1991) 17

Statutes, Regulations, and Rules of Court:

23 U.S.C. § 127 13

Pub. L. No. 85-767, § 127, 72 Stat. 885 (1958) 13

Pub. L. No. 86-624, § 17(e), 74 Stat. 416 (1960) 13

Pub. L. No. 93-643, § 106, 88 Stat. 2283 (1975) 13

Pub. L. No. 94-280, § 120, 90 Stat. 438 (1976) 13

Pub. L. No. 97-424, § 133, 96 Stat. 2123 (1983) 13

Pub. L. No. 100-17, 101 Stat. 157 (1987) 13

TABLE OF AUTHORITIES — Continued

Page

Pub. L. No. 100-202, § 101(l), 101 Stat. 1329 (1987) 13

49 U.S.C. §§ 31102-31104 15

49 U.S.C. § 31104 23

49 U.S.C. § 31136 23

49 U.S.C. § 31141 23

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ..... *passim*

49 U.S.C. § 31123 16

Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211 11

Federal Aid Road Act, Pub. L. No. 64-156, 39 Stat. 355 (1916) 5

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 ..... *passim*

49 U.S.C. § 14501 ..... *passim*

Federal Highway Act of 1921, Pub. L. No. 67-87, 42 Stat. 212 5

Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ..... 19, 24

National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat 195 (1933) 11

Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 ..... 12, 14

TABLE OF AUTHORITIES — Continued

Page

Motor Carrier Act of 1980,
Pub. L. No. 96-296, 94 Stat. 793 ..... 14, 15, 17

Motor Carrier Safety Act of 1984,
Pub. L. No. 98-554, tit. II, 98 Stat. 2832 ..... 15, 16, 17

National Traffic Motor Vehicle Safety Act,
Pub. L. No. 89-563, 80 Stat. 718 (1966) 13

49 U.S.C. §§ 30101-30169 ..... 12, 13

Surface Freight Forwarder Deregulation Act
of 1986, Pub. L. No. 99-521, 100 Stat. 2993 ..... 18, 19

49 U.S.C. § 11501 (1994) 19

Surface Transportation Assistance Act of 1982,
Pub. L. No. 97-424, 96 Stat. 2097 15

Tandom Truck Safety Act of 1984,
Pub. L. No. 98-554, tit. I, 98 Stat. 2832 16-17

Transportation Equity Act for the 21st Century,
Pub. L. No. 105-178, § 1206(b),
112 Stat. 107 (1998) 19

Federal Motor Vehicle Safety Standards,
49 C.F.R. part 571 13

S. Ct. Rule 37.6 1

Legislative Materials:

131 CONG. REC. S6073 (daily ed. May 14, 1985) 18

132 CONG. REC. H8749 (daily ed. Sept. 30, 1986) 18

H.R. REP. NO. 677, 103d Cong.,
2d Sess. (1994) ..... *passim*

TABLE OF AUTHORITIES — Continued

Page

H.R. REP. NO. 311, 104th Cong., 1st Sess. (1995) 19

H.R. REP. NO. 550, 105th Cong., 2d Sess. (1998) 19

*Report of the Federal Coordinator of
Transportation 1933*, S. Doc. No. 152,
73d Cong., 2d Sess. (1934) 6, 8, 11, 12

S. REP. NO. 176, 104th Cong., 1st Sess. (1995) 17, 24

Press Release, U.S. Senate Comm. on Commerce,
Science & Transp., *Senate Passes Pressler's
ICC-FMC 'Sunset' Bill* (Nov. 29, 1995) 24

Miscellaneous:

WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC
INTEREST: THE EMERGENCE OF FEDERAL
REGULATION 1914-1940 (1985) ..... *passim*

THE COMPACT OXFORD ENGLISH DICTIONARY
(2d ed. 1991) 5

Fritz R. Kahn, *Motor Carrier Regulatory
Reform — Fait Accompli*, 19 TRANSP. J. 5
(1979) 14

David E. Lilienthal & Irwin S. Rosenbaum,
*Motor Carriers and the State: A Study in
Contemporary Public Utility Legislation*,
2 J. LAND & PUB. UTIL. ECON. 257
(July 1926) 10

HAROLD G. MOULTON, THE AMERICAN
TRANSPORTATION PROBLEM (1933) 5

TABLE OF AUTHORITIES — Continued

Page

G. Shorey Peterson, *Motor Carrier Regulation and Its Economic Bases*, 43 Q.J. ECON. 604 (1929) 6, 10

LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION (1994) 5, 6, 11, 12

George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) 5, 6

William E. Thoms, *Rollin' On . . . To a Free Market: Motor Carrier Regulation 1935-1980*, 13 TRANSP. L.J. 43 (1983) 5

Ernest W. Williams, Jr., *The ICC and the Regulation of Intercarrier Competition*, 63 HARV. L. REV. 1289 (1950) 6

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE CALIFORNIA TRUCKING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States, including tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA regularly advocates the trucking industry's common interests before this Court and other courts. ATA and its members have a strong interest in motor carrier regulations generally and more particularly in matters relating to truck safety such as the statutory provision at issue in this case. *See* 49 U.S.C. § 14501(c)(2)(A). Moreover, ATA has special familiarity with the matters raised in this case because it actively participated in the formulation of federal motor carrier deregulation policy and helped shape Congress's decision to allow limited regulatory protection for non-economic factors such as truck safety. *See* H.R. REP. NO. 677, 103d Cong., 2d Sess., at 88 (1994).

---

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel have made a monetary contribution to this brief's preparation or submission.

Letters from the parties consenting to the filing of this *amicus* brief have been lodged with the Clerk of the Court.

The California Trucking Association ("CTA") is the state trade association representing motor carriers and their suppliers in California. CTA is a member organization of ATA that, like all state trucking associations, is independently governed and has its own membership. The 2,500 member companies of CTA cover all aspects of the trucking industry and include both intrastate and interstate motor carriers. CTA's members have long experience with burdensome local permit requirements, licensing fees, and franchise taxes imposed by California municipalities.

Section 14501 on its face preempts states, political subdivisions of states, and political authorities of two or more states from imposing regulations that relate to the prices, routes, or services of motor carriers, except in certain limited circumstances that Congress expressly identified. The court below — like the Fifth, Ninth, and Eleventh Circuits and an array of lower federal and state courts — chose to take Congress at its word and, consistent with the history of motor carrier regulation generally and the legislative history of Section 14501 in particular, declined to expand the spheres of permissible state and local regulation beyond what Congress authorized. Petitioners, seeking to escape this limitation on their regulatory authority over motor carriers, ask this Court to rewrite Section 14501 to grant each and every municipality the authority to impose on motor carriers its preferred size and weight restrictions for trucks and cargo, insurance requirements, bond requirements, and the like, thus licensing a patchwork system of local regulation that Congress has labored for well over half a century to prevent.

The issue in this case thus has substantial significance to *amici*'s members, who put thousands of trucks on the road every day of the year. For example, the decisions of the Ninth Circuit in *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1051 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001), and of the district court in *California Dump Truck Owners Association* v.

Davis, 172 F. Supp. 2d 1298, 1302-1303 (E.D. Cal. 2001), currently provide California truckers with the only meaningful protection against enforcement of administratively and financially burdensome local tax and permit requirements, which communities often couch in the language of safety regulation but in fact employ to further goals of economic protectionism and revenue raising. If, as petitioners request, the reasoning of the Fifth, Sixth, Ninth, and Eleventh Circuits is rejected and the will of Congress is frustrated, not only will the ability of motor carriers to conduct business in multiple jurisdictions be inhibited, but the power of the federal government and the states to impose uniform safety standards and other trucking regulations will be undermined.

Amici seek to inform the Court of the importance of the issues raised by the petition, and in particular the deleterious effect on the trucking industry that will result if the decision below is not upheld.

SUMMARY OF THE ARGUMENT

Section 14501 is not solely — or even principally — concerned with tow-trucks. Instead, Congress enacted it as part of a systematic effort to free the motor carrier industry as a whole from stifling economic regulation (while leaving unhindered the ongoing efforts of the federal government to achieve uniform and effective truck safety standards).

The statute broadly preempts ***States and political subdivisions*** from regulating motor carriers but sets aside spheres in which ***States*** may exercise limited regulatory authority. The only way for petitioners to escape from the plain language of the statute is to claim that Congress could not possibly have meant what it said. But that claim is hollow. Given both the long history of patchwork local regulation interfering with the conduct of interstate commerce and the express legislative intent to deregulate the motor carrier industry both nationally and locally, it was entirely rational for

Congress to broaden federal preemption over intrastate regulation while affording States alone carefully circumscribed regulatory authority with respect to truck safety.

ARGUMENT

As the Fifth, Sixth, Ninth, and Eleventh Circuits have held, and as respondents persuasively show in their brief, 49 U.S.C. § 14501(c)(2)(A) unambiguously affords States alone an exception to federal preemption for truck safety regulations. Because respondents' brief demonstrates the statute's crystal clarity and responds directly and persuasively to the various statutory arguments raised by petitioners and their *amici*, we will not burden the Court with additional arguments supporting the conclusion that "a plain reading of this provision indicates that municipalities are not included within [the] definition" of "State." *Tocher*, 219 F.3d at 1051; *R. Mayer of Atlanta, Inc.* v. *City of Atlanta*, 158 F.3d 538, 543 (11th Cir. 1998); *California Dump Truck Owners Ass'n*, 172 F. Supp. 2d at 1302-1303. Instead, *amici* will demonstrate that limiting safety regulatory authority to the States was a perfectly rational thing for Congress to do and hence debunk petitioners' suggestion that Congress could not have meant to make that choice.

A. The Rise And Decline Of Motor Carrier Regulation.

In support of their rejection of the plain meaning of the statute, petitioners devote a substantial portion of their brief to describing the history of towing and towing regulation. This case is not solely about tow trucks, however. Instead, it is about the past and future of the motor carrier industry as a whole, and Congress's efforts first to regulate and then to deregulate that industry.

1. The history of American economic development in the Twentieth Century is inextricably intertwined with the growth of the modern motor carrier industry. But the relationship between trucking and trade goes back much farther. Indeed, as

early as the Thirteenth and Fourteenth Centuries, the term "truck," in one spelling or another, came to be associated with the exchange of commodities. *See* THE COMPACT OXFORD ENGLISH DICTIONARY 602-603 (2d ed. 1991). And as long ago as 1611 the term was used to connote a wheeled conveyance. *See ibid.*

The modern motorized truck appeared not long after the advent of the gasoline-powered automobile. It did not find wide acceptance in the United States, however, until its advantages over horse-drawn conveyances were demonstrated during World War I. *See, e.g.*, WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940, at 1-3, 8-19 (1985). Even then, the lack of good roads and the relative fragility of the early vehicles limited truck service for the most part to intra-city deliveries. *See, e.g.*, William E. Thoms, *Rollin' On . . . To a Free Market: Motor Carrier Regulation 1935-1980*, 13 TRANSP. L.J. 43, 44 (1983); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 8 (1971).

Passage of the Federal Aid Road Act, Pub. L. No. , 39 Stat. 355 (1916), and the Federal Highway Act of 1921, Pub. L. No. 67-87, 42 Stat. 212, and the imposition of state gasoline taxes went a long way toward correcting these problems, however. Over the course of the next decade, these sources of funding made possible dramatic improvements in the quality of both intra- and inter-city roads. *See* HAROLD G. MOULTON, THE AMERICAN TRANSPORTATION PROBLEM 530-538 (1933). And road improvements, together with technological advances in truck equipment, permitted the trucking industry to develop as a viable competitor to the railways. *See* WILLIAM R. CHILDS, *supra*, at 14. Indeed, by the mid- to late-1920's, motor carriers — with their flexible routes and schedules and ability to deliver small, high-value loads efficiently — were able to draw the most profitable business away from the already ailing railroad industry. *See, e.g.*, LAWRENCE S. ROTHENBERG, REGULATION,

ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION 44 (1994); WILLIAM R. CHILDS, *supra*, at 27-28; Ernest W. Williams, Jr., *The ICC and the Regulation of Intercarrier Competition*, 63 HARV. L. REV. 1289, 1349-1372 (1950); *Report of the Federal Coordinator of Transportation 1933*, S. DOC. NO. 152, 73d Cong., 2d Sess., at 14-18, 35 (1934). *See generally* G. Shorey Peterson, *Motor Carrier Regulation and Its Economic Bases*, 43 Q.J. ECON. 604, 611-612 (1929).

2. In an effort to curb this new competition, the railroads successfully mobilized to attain state regulation of motor carriers, thus effectively reasserting some of their declining monopsonistic power over intercity and interstate shipping. "By the mid-1920s, most states had instituted some form of motor carrier regulation, largely consisting of rules on safety, licensing, insurance, and standards of service." LAWRENCE S. ROTHENBERG, *supra*, at 44; G. Shorey Peterson, *supra*, 43 Q.J. ECON. at 607-608. And these "safety" regulations tended to be particularly stringent when in-state interests benefitted from economic protectionism of the railroads. *See ibid.* ("In particular, those states whose shippers benefited substantially from [the railroads'] value-of-service pricing proved willing to limit motor carriers."); George J. Stigler, *supra*, 2 BELL J. ECON. & MGMT. SCI. at 8 ("Sometimes the participation of the railroads in the regulatory process was incontrovertible: Texas and Louisiana placed a 7000-pound payload limit on trucks serving (and hence competing with) two or more railroad stations, and a 14,000-pound limit on trucks serving only one station (hence, not competing with it).").

Inevitably, the resulting patchwork of state regulations — many taking the form of safety requirements — interfered with the standardization of vehicles and wreaked havoc on the burgeoning motor carrier industry. Indeed, as one commentator has explained:

> Whether direct or indirect, the state laws varied markedly from one state to the next. * * * If a trucker began a trip in Chicago, heading east, he could load a truck and trailer with a total of 39,000 pounds, 20,000 on the truck and 19,000 in the trailer. When he approached the Indiana border, he had to remove 16,000 pounds from the truck and 12,800 pounds from the trailer to meet the Hoosier State's limit of 10,200 pounds. Once in Ohio he could add a total of 7,000 pounds; Pennsylvania allowed an additional 14,000 pounds (to total 31,200). * * *
>
> In addition to the weight restrictions, states imposed different limits on the height, length, and width of commercial vehicles. Pennsylvania allowed heights to 174 inches, but Indiana only 144 inches. Maximum lengths of combination vehicles (tractor and trailer) varied widely, from forty feet in Connecticut, Illinois, and Indiana, to seventy in Pennsylvania and eighty-five in Rhode Island. * * *
>
> State laws imposing license fees and gasoline taxes also created problems for the aspiring interstate truckers. Enforcement of these laws in one state often provoked retaliation in neighboring states. "Border wars" erupted in which highway patrolmen waited just inside the state line to fine out-of-state truckers who failed to have license and gasoline receipts. * * *
>
> * * * * *
>
> Whether based upon geographic necessities, public opinion, or railroad lobbying, state laws created problems for those engaged in or associated with the motor carrier business. Local, state, and interstate truckers suffered from increased operating costs, while [truck] manufacturers faced diverse production requirements and a growing used-truck market (caused

in part by the bankruptcies of inexperienced drivers under pressure of the increased costs).

WILLIAM R. CHILDS, *supra*, at 52, 54. In short, "the diversity in state laws was enough to slow the emergence of interstate trucking." *Id.* at 54. *See generally* S. DOC. NO. 152, 73d Cong., 2d Sess., at 188-189, 191, 205-221 (detailing differences among state regulations applicable to interstate carriers).

3. In the latter half of the 1920's and the early 1930's, this Court took the first real steps toward a much needed remedy for this stifling system of complicated and often conflicting state regulations. The Court's initial foray into matters of state regulation of trucking began with *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570 (1925). *Duke* involved a challenge to a Michigan statute that both converted private motor carriers of property into common carriers and conditioned truckers' rights to use the state's highways on their acquisition of a certificate of public convenience and necessity (which in turn depended, among other things, on payment of a fee and satisfaction of an indemnity bond requirement). *See id.* at 574. The Court reasoned that, "in the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles," as long as those regulations are neither unreasonable nor unduly burdensome. *Id.* at 576. The Court nonetheless explained that "it is well settled that a state has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it." *Id.* at 577. Accordingly, because the Michigan statute had "no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of

compensation for the use of the highways" (*ibid.*), the Court held that the statute violated the Commerce Clause.[2]

The Court reached a similar conclusion in *Buck* v. *Kuykendall*, 267 U.S. 307 (1925). In *Buck*, the Court struck down a Washington statute requiring motor carriers to obtain certificates of public convenience and necessity, reasoning that the Commerce Clause limits a state's ability to regulate motor vehicles to the imposition of reasonable requirements that are necessary to promote safety and conserve the state's highways, and that anything beyond such indirect burdens on commerce is impermissible.[3] *See id.* at 315-316; *see also Smith* v. *Cahoon*, 283 U.S. 553, 562-563 (1931) ("regulation of the business of a private carrier * * * is manifestly beyond the power of the state"); *George W. Bush & Sons Co.* v. *Maloy*, 267 U.S. 317 (1925) (striking down Maryland common carrier permit requirement both under Commerce Clause and because statute was inconsistent with congressional intent that state highways be open to interstate commerce). And in *Frost* v. *Railroad Commission*, 271 U.S. 583 (1926), the Court struck down, *inter alia*, a statute requiring private carriers to obtain permits from municipalities, thereby making clear that the limits on state

---

[2] The Court also held that the conversion of private motor carriers into common carriers constituted a taking of private property barred by the Due Process Clause of the Fourteenth Amendment. *See id.* at 577-578.

[3] The Court held that the statute unreasonably burdened interstate commerce and encroached on the exclusive legislative authority of Congress over the dissent of Justice McReynolds, who argued — as petitioners do in the instant case — that the problems necessitating highway use restrictions and other such regulations "are essentially local" and that "[t]he federal government has not and cannot undertake precise regulation." *See George W. Bush & Sons Co.* v. *Maloy*, 267 U.S. 317, 325 (1925) (McReynolds, J., dissenting) (dissent to companion cases of *Buck* and *Bush*).

regulatory authority recognized in *Duke* extended also to political subdivisions.

In many instances, however, states and localities simply flouted the Court's rulings and continued to regulate motor carriers by virtually the same means that the Court had repeatedly rejected. *See, e.g.*, David E. Lilienthal & Irwin S. Rosenbaum, *Motor Carriers and the State: A Study in Contemporary Public Utility Legislation*, 2 J. LAND & PUB. UTIL. ECON. 257, 259-262 (July 1926) (governor of Maryland interpreted *Bush* narrowly as not interfering with state licensing, weight, and height requirements; Washington continued to require truckers to obtain certificates to use roads, albeit without requiring proof of public convenience and necessity). Yet largely in response to *Duke* and its progeny, the railroads and others favoring motor carrier regulation redirected their efforts to the national arena. *See, e.g.*, G. Shorey Peterson, *supra*, 43 Q.J. ECON. at 605-606. Indeed, the day after *Buck* was decided, the first proposal for federal motor carrier regulation was introduced in Congress, thus moving the industry one step closer toward uniform national regulation.[4]

---

[4] In 1932, the Court's position shifted somewhat, becoming more tolerant of state regulation. *Stephenson* v. *Binford*, 287 U.S. 251 (1932), for example, upheld a state permit requirement for private motor carriers that substantially reproduced the regulatory scheme struck down in *Duke* and *Bush*. *See id.* at 265-266. And *Sproles* v. *Binford*, 286 U.S. 374 (1932), approved the imposition by a state of maximum truck length requirements and load limits. Moreover, the *Sproles* Court justified that result in part using *Duke*'s rationale that, absent federal action, safety and highway conservation are valid state legislative objectives. *See id.* at 390 ("'In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens'"; "in matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act") (quoting *Morris* v. *Duby*, 274 U.S. 135, 143 (1927); citing *Minnesota Rate Cases*, 230 U.S. 352, 399-400 (1913)). Whether because the more permissive application of this principle came too late to reverse the trend or because the inefficiencies and other disadvantages of local regulation had already been exposed, however, these decisions did not alter the federal focus of pro-regulation interests.

See LAWRENCE S. ROTHENBERG, *supra*, at 45; *see also* S. DOC. NO. 152, 73d Cong., 2d Sess., at 24-25, 33 (noting role of railroads in proposing federal motor carrier regulation following decisions in *Buck* and *Bush*).

4. The efforts to obtain federal regulation finally began to bear fruit under the Administration of Franklin Delano Roosevelt, who had made rescue of the railroads from their dire financial straits a prime element of his first Presidential campaign. *See* LAWRENCE S. ROTHENBERG, *supra*, at 48. The Roosevelt Administration initially pursued both direct government regulation and cooperative industry self-regulation. In this regard, the Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211, authorized the creation of the Office of the Federal Coordinator of Transportation. And the new Coordinator — ICC member Joseph Eastman — would come to spearhead the move toward formal regulation of the motor carrier industry. *See generally* S. DOC. NO. 152, 73d Cong., 2d Sess., *supra*. At the same time, the National Industrial Recovery Act ("NIRA"), Pub. L. No. 73-67, 48 Stat 195 (1933), created the National Recovery Administration ("NRA") and authorized it, among other things, to erect a system of private controls over trucking.

Under ATA's leadership, the motor carrier industry worked with the NRA to propound an industry-wide "code of fair competition" and to institute a National Code Authority and State Code Authorities to administer and enforce that code. *See* LAWRENCE S. ROTHENBERG, *supra*, at 49; WILLIAM R. CHILDS,

supra, at 106-115; *see also* S. DOC. NO. 152, 73d Cong., 2d Sess., at 27, 29. By early 1935, however, it had become clear to both ATA and the Federal Coordinator of Transportation that attempts at industry self-regulation would be unworkable absent meaningful federal support (*see* WILLIAM R. CHILDS, *supra*, at 117), including price controls (*see* LAWRENCE S. ROTHENBERG, *supra*, at 49). The final blow to industry self-regulation came in the form of the decision in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), in which the Court struck down the NIRA.

Together, these events left systematic federal regulation the only viable option to coordinate the trucking industry and hence set the stage for passage of the Motor Carrier Act of 1935 ("1935 MCA"), Pub. L. No. 74-255, 49 Stat. 543. The 1935 MCA made comprehensive regulation possible by bringing interstate trucking under the auspices of the Interstate Commerce Commission ("ICC"). It invested the ICC with authority to regulate motor carriers and drivers engaged in interstate commerce by, among other things, approving trucking routes, setting tariff rates, and imposing surety bond and insurance requirements. *See id.* §§ 204, 215-218. It also gave the ICC authority to issue operating permits and certificates of public convenience and necessity, and prohibited motor carriers from engaging in interstate commerce without such licenses. *See id.* §§ 206-210, 212.[5]

The 1935 MCA remained virtually unchanged for some 45 years. During that time, the ICC exerted broad regulatory control over, among other things, motor carrier rates, routes, and services, while Congress increasingly imposed and authorized the implementation of uniform national safety

[5] The 1935 MCA did, however, include a "grandfather clause" that directed the ICC to issue operating permits automatically, upon timely application, to motor carriers already engaged in interstate commerce prior to the effective date of the Act. *See id.* § 209.

standards for trucks and trucking. *See, e.g.*, National Traffic Motor Vehicle Safety Act, Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101-30169); 23 U.S.C. § 127 (establishing size and weight limitations for vehicles using interstate highways);[6] Federal Motor Vehicle Safety Standards, 49 C.F.R. part 571. Yet despite increasingly comprehensive federal regulation of virtually every aspect of the motor carrier industry — and especially of truck safety — states continued to assert authority over trucks and trucking, thus often frustrating Congress's goal of achieving uniformity and predictability of motor carrier regulations. Indeed, this continuing parochialism and the havoc it wreaked on interstate commerce necessitated the intervention of this Court on multiple occasions. *See, e.g.*, *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (invalidating law barring use of trucks longer than 60 feet on Iowa's interstate highways); *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429 (1978) (striking down Wisconsin regulations barring from the state's highways trucks longer than 55 feet); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (striking down Illinois statute requiring special mudguards on trucks because requirement unduly burdened interstate commerce).[7]

[6] Federal highway vehicle weight restrictions were established initially in 1958 (*see* Pub. L. No. 85-767, § 127, 72 Stat. 885 (1958)), and have been revised periodically to reflect innovations in truck design and safety equipment as well as other technological developments. *See, e.g.*, Pub. L. No. 86-624, § 17(e), 74 Stat. 416 (1960); Pub. L. No. 93-643, § 106, 88 Stat. 2283 (1975); Pub. L. No. 94-280, § 120, 90 Stat. 438 (1976); Pub. L. No. 97-424, § 133, 96 Stat. 2123 (1983); Pub. L. No. 100-17, §§ 133(a)(3), 119, 101 Stat. 157; Pub. L. No. 100-202, § 101(l), 101 Stat. 1329 (1987).

[7] Petitioners incorrectly suggest that *H.P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939), and *Maurer* v. *Hamilton*, 309 U.S. 598 (1940), demonstrate this Court's recognition and approval of municipal regulation. Both *Welch* and *Maurer* dealt with regulations

5. By the mid- to late-1970's, increasingly widespread recognition of the need to deregulate motor carriers and thereby to increase competition had resulted in the ICC's exercise of its rulemaking authority to relax the restrictions on the industry. *See, e.g.*, Fritz R. Kahn, *Motor Carrier Regulatory Reform — Fait Accompli*, 19 TRANSP. J. 5, 7-9 (1979). With the passage of the Motor Carrier Act of 1980 ("1980 MCA"), Pub. L. No. 96-296, 94 Stat. 793, such measures were given congressional imprimatur and the stage was set for broader economic deregulation that eventually would extend also to intrastate motor carrier services. *See, e.g.*, Federal Aviation Administration Authorization Act of 1994 ("FAA Authorization Act"), Pub. L. No. 103-305, 108 Stat. 1569.

The same understanding about the need for deregulation resulted in the passage of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, which among other things eased restrictions on the air carrier industry. In order to ensure the success of this deregulatory effort, Congress included federal preemption provisions providing that "no State or

---

imposed by state legislatures, and the Court's use of the term "local" to distinguish them from "federal" legislation is hardly authority for the proposition that municipal regulation of trucking has ever been deemed permissible, much less that Congress in 1994 intended to extend such power over interstate commerce to municipalities. Thus, although in *Welch* the Court speaks of "local supervision" (*see* 306 U.S. at 84), it is plain that what the Court had in mind was regulation at the state level. *See id.* at 84-85 (holding that "[t]he roads belong to the ***State***," and hence that, in absence of evidence of clear legislative intent, "it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a ***state***") (emphasis added). Similarly, in *Maurer*, the Court's discussion of whether Congress intended to displace "local laws" with the passage of the 1935 MCA (306 U.S. at 614) was clearly directed to the question of the extent and limits of "***state*** power" (*id.* at 616) and in no sense implicated any issue of the scope of permissible municipal regulation.

political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." *Id.* § 4(a). At the same time, the preemption provisions preserved the "authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights" (*ibid.*), and provided that when any intrastate air carrier "regulated by a State" received authority to engage in interstate operations, the authority it had previously received from that state would be made part of its authority from the federal agency that would now take over the task of regulating it (*ibid.*).

At the same time that Congress was deregulating the motor carrier and air carrier industries, it took steps to ensure that truck safety was not compromised. First, it created the Motor Carrier Safety Assistance Program as part of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097. This legislation authorized the Department of Transportation ("DOT") to provide grants to states for development of programs to extend federal truck safety standards to intrastate motor carriers, thus furthering the historic goal of uniformity of safety regulations. *See* 49 U.S.C. §§ 31102-31104.

Two years later, Congress passed Public Law No. 98-554, 98 Stat. 2832, which dramatically expanded the scope of federal truck safety regulation. Title II of that statute — the Motor Carrier Safety Act of 1984 — directs the Secretary of Transportation to establish minimum federal safety standards for commercial motor vehicles. *See id.* § 206. It then directs "[a]ny State which enacts, adopts, issues, or has in effect any law or regulation pertaining to commercial motor vehicle safety" to submit such law or regulation to the Department of

Transportation ("DOT") for approval. *See id.* § 207. The Act provides for broad federal preemption of such statutes or regulations if the DOT determines that they (1) are less stringent than the federal safety requirements, (2) are incompatible with DOT safety regulations, (3) unreasonably burden interstate commerce, or (4) yield no safety benefits.[8] *See id.* § 208(c). In short, inconsistent state safety laws having interfered with interstate commerce since the 1920's, Congress consolidated in the hands of the DOT the authority to preserve uniform nationwide safety standards.

In setting forth this comprehensive truck safety scheme, moreover, Congress further clarified that the distinction it had wrought in the Airline Deregulation Act between the carrier safety regulatory authority of States and that of States and political subdivisions (*see* 49 U.S.C. § 31132(7)) was intentional. Specifically, it provided that the term "'State' means a State of the United States, the District of Columbia, and, ***in sections 31136 and 31140-31142 of this title***, a political subdivision of a State." 49 U.S.C. § 31132(7) (emphasis added). This reflects Congress's awareness that the term "State" does not ordinarily mean "State and its subdivisions" and that when it intended motor carrier legislation to apply to States and their subdivisions it said so expressly.[9]

---

[8] Title I — the Tandom Truck Safety Act of 1984 — similarly reconfirms federal authority to regulate motor carrier safety. While the Act affords state governors the opportunity to request exemptions from federal statutory truck length and width requirements for portions of the interstate highway system determined to be incapable of safely accommodating otherwise lawful vehicles, it invests the DOT with discretion to grant or deny such gubernatorial requests (or to grant such exemptions on the agency's own initiative). *See id.* §§102-103.

[9] This language also serves to distinguish the motor carrier statutes from the Federal Insecticide, Fungicide, and Rodenticide Act

With the history of the motor carrier industry — including the development first of dysfunctional state regulation and subsequently of coordinated federal oversight — serving as a backdrop, Congress in the 1980's and 1990's recognized that regulatory frameworks "introduced in the 1930's when trucking was a new and struggling industry, ha[d] outlived all usefulness." S. REP. NO. 176, 104th Cong., 1st Sess., at 10 (1995). Accordingly, it proceeded with a series of measures to deregulate the trucking industry that ultimately led to passage of Section 14501 in its present form.

6. Thus, the stage was set for passage of Section 14501 by federal deregulation of air carriers (and federal preemption of state and local regulation) in the Airline Deregulation Act, loosening of ICC control over the motor carrier industry in the 1980 MCA, the extension of uniform federal safety standards to intrastate trucking through the Motor Carrier Safety Assistance Program, and reaffirmance and solidification of federal control over interstate motor carrier safety through the Motor Carrier Safety Act and the Tandem Truck Safety Act. Congress's next significant step in scaling back the regulatory

---

("FIFRA") construed by this Court in *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991). In *Mortier*, the Court held that the fact that FIFRA's definition of "State" does not include political subdivisions is not a sufficient basis for concluding that Congress intended to preempt pesticide regulation by political subdivisions. *Id.* at 607-609. In the Court's view, the statute "plainly authorizes the 'States' to regulate pesticides and just as plainly is silent with reference to local governments." *Id.* at 607. The same is not true of the motor carrier statutes. As indicated above, the definitional section of the Motor Carrier Safety Act of 1984 draws an explicit distinction between "States" on the one hand and "States and their political subdivisions" on the other hand. And both the Airline Deregulation Act and the FAA Authorization Act refer to States in some places and States and their subdivisions in other places ***within the very same section.*** They thus plainly are not "silent with reference to local goverments."

structures in which the motor carrier industry had been mired was passage of the Surface Freight Forwarder Deregulation Act of 1986 ("SFFDA"), Pub. L. No. 99-521, 100 Stat. 2993. That Act "remove[d] the power of the ICC to prescribe rates, rules, classifications and practices of freight forwarders involved in both intrastate and interstate commerce," while at the same time "prevent[ing] states and other local governments from exercising regulatory authority over areas of interstate commerce * * * being vacated by the Interstate Commerce Commission * * *." 131 CONG. REC. S6073 (daily ed. May 14, 1985) (statement of Sen. Packwood) (section-by-section analysis of S. 1124).[10] In other words, it afforded freight forwarders the freedom to coordinate rates and services with the deregulated rail and motor carriers who would perform the actual carriage operations. *See* 132 CONG. REC. H8749 (daily ed. Sept. 30, 1986) (statement of Rep. Shuster).

Like the Airline Deregulation Act, the SFFDA furthered Congress's desire to replace governmental control with free market competition by prohibiting states and local governments from stepping in to reimpose regulations on the industry once federal oversight had been withdrawn. *See, e.g.*, 131 CONG. REC. S6073 (statement of Sen. Packwood) (explaining that "[t]his subsection is intended to prevent states and other local governments from exercising regulatory authority over areas of interstate commerce that are being vacated by the Interstate Commerce Commission"). Precisely reproducing the language of the preemption provision for air carriers (*see* Airline Deregulation Act § 4(a)), it provided that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force

[10] Freight forwarders are essentially brokers who consolidate and coordinate shipments of goods. *See, e.g.*, *Chicago, Milwaukee, St. Paul & Pac. R.R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 467, 484 (1949).

and effect of law relating to interstate rates, interstate routes, or interstate services of any freight forwarder." *See* Pub. L. No. 99-521, § 11(g)(1) (codified at 49 U.S.C. § 11501 (1994)).

Then, in 1994, Congress revisited the issue of motor carrier deregulation, this time to address matters of intrastate regulation as well as inequities between air carriers and freight forwarders (who were afforded federal preemption protection) on the one hand, and motor carriers (who were not) on the other. The result was that Congress amended the preemption provisions of the Surface Freight Forwarder Deregulation Act to encompass motor carriers of property and place them on an equal footing with air carriers. *See* FAA Authorization Act § 601.[11]

According to the Conference Committee report, Section 601 of the FAA Authorization Act was intended to preempt a "patchwork" of intrastate motor carrier regulations in 41 states that placed intolerable burdens on interstate commerce by causing "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ing] the expansion of markets." H.R. REP. NO. 677, 103d Cong., 2d Sess., at 87; *see also* H.R. REP. NO. 311, 104th Cong., 1st Sess., at 92 (1995) (summarizing purposes of preemption provisions of FAA Authorization Act); *Tocher*, 219 F.3d at 1048; *Mayer*, 158 F.3d at 546. As Congress forthrightly explained, "[t]he sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to

[11] Subsequently, in 1998, Congress further amended Section 14501 to extend federal preemption to motor carriers of passengers, once again incorporating the precise language of the Airline Deregulation Act and the SFFDA, as well as the safety regulatory authority exception of the ICC Termination Act. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1206(b), 112 Stat. 107 (1998) (codified at 49 U.S.C. § 14501(a); *see also* H.R. REP. NO. 550, 105th Cong., 2d Sess., at 496 (1998) (explaining Conference Committee's decision to include "clarifying provision * * * to ensure that states may continue to regulate safety").

conduct a standard way of doing business." H.R. REP. NO. 677, 103d Cong., 2d Sess., at 87.

More broadly, Section 601 was intended "to create consistency with the [Airline Deregulation Act] preemption provision." *Id.* at 83. Indeed, the Conference Committee explained that "[t]he central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes and services as that originally contained in" the Airline Deregulation Act.[12] *Ibid.* To this end, the Committee explained that:

> The preemption provision * * * is identical to the preemption provision deregulating air carriers and carriers affiliated with a direct air carrier through common controlling ownership and is intended to function in the exact same manner with respect to its preemptive effects. The intention is to create a

[12] More concretely, the purpose of the legislation was "as completely as possible [to] level the playing field between air carriers on the one hand and motor carriers on the other." *Id.* at 82. This change was especially crucial because the ruling in *Federal Express Corp.* v. *California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), resulted in inequitable burdens that placed some motor carriers at a "competitive disadvantage" with respect to their air carrier counterparts. H.R. REP. NO. 677, 103d Cong., 2d Sess., at 87. In that case, the Ninth Circuit held that the preemption provisions of the Airline Deregulation Act freed the courier service Federal Express from California state motor carrier regulations because the company is formally organized as an "air carrier," even though some of its operations involved purely intrastate trucking. By contrast, federal preemption did not extend to companies such as United Parcel Service ("UPS") because they happened to be organized as "motor carriers," even though they were engaged in precisely the same business as Federal Express. *See id.* at 87.

> completely level playing field between air carriers and carriers affiliated with a direct air carrier through common controlling ownership on the one hand and motor carriers on the other.

Id. at 85. It was in the context of this statutory scheme and the broader objective of industry deregulation that Congress enacted the exception to federal preemption that is the subject of the instant case. *See* FAA Authorization Act § 601(h) (codified at 49 U.S.C. 14501(c)(2)(A)).[13]

B. In Enacting Section 14501(c)(2)(A), Congress Had Good Reason To Distinguish Between States And Political Subdivisions.

Congress's explicit choice to preempt state and local regulation of motor carrier rates, routes, and services while at the same time granting limited safety regulatory authority to the States (subject to the approval of the DOT) was a perfectly logical and appropriate means to deal with problems of inconsistent regulation that had plagued trucking and burdened interstate commerce since the birth of the motor carrier industry.

As explained above, Congress, the ICC, and this Court first recognized more than half a century ago that a hodge-podge of local motor carrier regulations harms not only the trucking industry but interstate commerce generally. That conclusion is no less valid today. Indeed, this Court has witnessed firsthand

[13] That exception provides that the preemption provisions "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization * * *." *Ibid.*

the deleterious effects on interstate commerce that flow from non-uniform ***state*** regulation, whether undertaken for the purpose of promoting safety or for protectionist reasons. *See Kassel*, *supra*; *Raymond*, *supra*; *Bibb*, *supra*. Just as in the 1920's, so today do truck size and weight limitations, route restrictions, safety device requirements, bond and insurance provisions, and the like substantially burden commerce. And if permitted to vary from town to town and county to county, they can make it impractical if not impossible for carriers to conduct business in multiple jurisdictions.

Consider, for example, the situation of a nationwide motor carrier that conducts operations in communities throughout the country. Even if state and local regulations never came into direct conflict with one another — a wildly implausible assumption (*see, e.g.*, *Bibb*, 359 U.S. at 527 (Illinois and Arkansas mudguard requirements were irreconcilable); WILLIAM R. CHILDS, *supra*, at 52-54 (describing consequences of differing state size and weight requirements for trucks)) — for such a carrier to keep current on all of the individual municipal ordinances applicable to its trucking operations would be a Herculean task. And to monitor compliance with respect to each and every vehicle in the company's fleet as it passes through multiple political subdivisions in the course of a single day's work picking up and delivering parcels would be prohibitively expensive and administratively overwhelming. To say the least, "[t]he sheer diversity of these regulatory schemes [would be] a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. REP. NO. 677, 103d Cong., 2d Sess., at 87. If Congress could conclude that dire results flowed from only 41 separate regulatory schemes (*see id.* at 86), then the problems would take on epic proportions if independent regulatory authority devolved to each and every locality across the country. And for that reason alone, it was not just understandable, but

affirmatively good policy, for Congress to seek to minimize the hardships on carriers by limiting such authority to the States.

Furthermore, Congress plainly was cognizant of the danger that States might use their authority over vehicle safety "as a guise for continued economic regulation as it relates to prices, routes or services." *See id.* at 84. That concern is unsurprising, for Congress well knew that supposed safety regulations have historically been, and still to this day are, employed in pursuit of economic protectionism and revenue raising. *See* pages 6-10, *supra*; pages 25-27, *infra*.

The legislative determination to limit safety regulatory authority to States and not to extend it to political subdivisions or other local governmental units is thus entirely understandable in light of these overriding concerns. For as the Ninth Circuit concluded in *Tocher*, "[a]llowing both states and municipalities to escape preemption under the guise of regulating safety could lead to widespread, diverse regulation of motor carriers, precisely what Congress sought to avoid in promulgating a broad preemption statute." 219 F.3d at 1051; *see also Mayer*, 158 F.3d at 546. That is true in part, moreover, because the DOT would be unable to fulfill its statutory duty to oversee local (*i.e.*, state-level) regulation and thereby maintain uniform safety standards nationwide (*see, e.g.*, 49 U.S.C. §§ 31104, 31136, 31141) if it were forced to review and rule on the propriety of every supposed safety ordinance that each county and village in the nation might see fit to enact. Rather than permit the DOT to be overwhelmed by these oversight duties, Congress effectively reduced the number of potential demands on the agency so that it could adequately fulfill its role as guarantor of uniform safety standards.[14]

---

[14] Indeed, Congress's recognition only one year after passage of the motor carrier preemption provisions of a special need to reinstate a narrow sphere of municipal regulation — that concerning rates for non-consensual towing — underscores these conclusions. *See*

In short, the history of patchwork regulation of the motor

Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. § 14501(c)(2)(C)) (federal preemption "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck * * *"). When Congress amended Section 14501 to add the tow truck exception, it undoubtedly recognized the unique role that municipal regulation had always played with respect to the towing industry, as petitioners have ably recounted (*see* Brief for Petitioners at 2-8) as well as the special relationship between towing services and municipal authorities that order non-consensual tows. Far from supporting a reading of Section 14501(c)(2)(A) that would broadly license political subdivisions to impose safety regulations on tow trucks (or any other sorts of motor carriers), the amendment instead "correct[ed] a serious problem" unique to the towing industry that had been an "unintended consequence" of the extension of virtually complete federal preemption of local motor carrier regulation. *See* S. REP. NO. 176, 104th Cong., 1st Sess., at 10 (1995); Press Release, U.S. Senate Comm. on Commerce, Science & Transp., *Senate Passes Pressler's ICC-FMC 'Sunset' Bill* (Nov. 29, 1995) (reporting remarks of Sen. Pressler, sponsor of S. 1396, upon introduction of bill).

The amendment recognized that, while preemption is the normal rule, in the special circumstance of non-consensual towing (which typically is ordered by local law enforcement agents) regulation by local governing authorities remained necessary to protect the public from "exorbitant prices and unreasonable conditions * * *." S. Rep. 176, 104th Cong., 1st Sess., at 48. Under such circumstances, Congress did not hesitate to provide unambiguous authorization of local ordinances as well as state laws. *See* 49 U.S.C. § 14501(c)(2)(C) (expressly preserving "the authority of a State or a political subdivision of a State"). In other words, Congress was quite capable of recognizing the peculiar case in which municipal regulation was in the public interest and did not burden interstate commerce or interfere with the systematic deregulation of the motor carrier industry. And it was quite capable of clearly stating its intention to leave local regulatory authority in that area undisturbed.

carrier industry and its harmful effects on commerce was as well known to Congress when it passed Section 14501(c)(2)(A) as it is to this Court. It follows that the express choice to reserve some safety regulatory authority for the States without affording it also to political subdivisions was entirely sensible and cannot be dismissed as a mere statutory ambiguity.

C. Failure To Apply Section 14501(c)(2)(A) As Written Will Harm The Motor Carrier Industry And Inhibit Interstate Commerce.

Nor are the dangers of petitioners' proffered reading of the statute merely hypothetical. On the contrary, "safety" regulation by municipalities and other political subdivisions is alive and well, and is a continuing threat to the motor carrier industry as well as a substantial burden on commerce.

In the experience of *amici* and their members, cities, counties, and other local governments across the country impose and enforce myriad licensing and permit requirements, franchise taxes, bond requirements, size and weight restrictions, and similar controls. Though frequently couched in terms of safety concerns, the real purpose of these measures is very often to raise revenue and/or protect local interests from out-of-town or out-of-state competition.

Because their trucks may traverse a dozen or more local jurisdictions in a single day even when making only "local" deliveries, *amici*'s members frequently find themselves subject to duplicative, conflicting, or otherwise abusive regulations. In *amici*'s experience, for example, many carriers have had trucks impounded for failure to pay local taxes that they never knew they owed, by political subdivisions whose jurisdictions they may not even have realized they had entered. Similarly, carriers routinely experience selective enforcement of local ordinances, a hardship to the truckers as well as a clear violation of the Due Process, Equal Protection, and Commerce Clauses. And the

risks are, of course, compounded exponentially for regional or nationwide carriers.

A few recent encounters of *amici*'s members with local regulators and law enforcement officials will serve to highlight the logic of Congress's decision to preempt motor carrier regulation by political subdivisions. In one case, a trucking firm carrying construction materials to an approved building site in the City of Orange, California was informed by municipal officials that it would have to purchase permits — at a cost of some $70,000 — if it wished to operate its trucks over the city streets. And without those permits, the carrier would be prohibited from meeting its contractual obligation to deliver the materials to the job site. Notwithstanding that the carrier's trucks complied with all applicable size and weight restrictions and that trucks regularly serving a local grocery warehouse and a service station used the same roads without being assessed fees or imposing undue safety risks, the city sought to enforce its permit requirement selectively against the out-of-town carrier. Whether designed to eke extra revenues from out-of-town truckers or to hoard motor carriage business for local firms, the permit requirement constituted a substantial threat to the carrier's ability to conduct operations (and one that was overcome only when the carrier invoked the decisions in *Tocher*, *supra*, and *California Dump Truck Owners Association*, *supra*). In another instance, a carrier recently discovered that the City of Los Angeles and a neighboring county could not agree on whether to require that an "over dimensional" load — *i.e.*, one that is oversized or overweight — be shipped only during the day or instead only at night. Thus, neither political subdivision would issue the carrier a permit to use its streets and the carrier was stuck in its tracks.

These incidents are by no means atypical. On the contrary, in *amici*'s experience, instances of abusive imposition or enforcement of local ordinances under the pretext of safety regulation are legion. Congress in the exercise of its legislative

judgment opted to afford the trucking industry a measure of protection against multiplicative, conflicting, and burdensome local regulations and fees by enacting Section 14501. Petitioners' proffered interpretation of Section 14501(c)(2)(A) would cause Congress's deregulatory agenda to unravel and return the motor carrier industry to 1920's-style patchwork economic regulation, albeit under the guise of safety concerns — a result that Congress neither intended nor desired. Accordingly, that reading should be rejected and the decision of the court below should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

BETH L. LAW
ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
703-838-1865

EVAN M. TAGER
Counsel of Record
RICHARD B. KATSKEE
Mayer, Brown, Rowe & Maw
1909 K St., N.W.
Washington, D.C. 20006
202-263-3000

MARCH 2002

Supreme Court U.S.
FILED
MAR 21 2002
OFFICE OF THE CLERK

(22)

No. 01-419

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN,
AND BOBBIE DEAVERS
PETITIONERS,

V.

OURS GARAGE AND WRECKER SERVICE, INC., AND
THE TOWING AND RECOVERY ASSOCIATION OF OHIO,
RESPONDENTS.

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE *AMICUS CURIAE* CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION IN SUPPORT OF RESPONDENTS

EDWARD J. HEGARTY
COUNSEL OF RECORD
HEGARTY LAW OFFICE
7181 HIGHWAY 193
POST OFFICE BOX 360
GEORGETOWN, CA 95634
(530) 333-4900

BEST AVAILABLE COPY

19 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. Section 14501(c)(2)(A) Properly Undermines Local Size and Weight Route Regulations, to the Extent that Such Was Intended by Congress 6

A. Congress Clearly Intended to "Undercut" a City's Ability to Enact or Enforce Its Own Size and Weight Laws 6

B. Petitioners Overstate the District Court's Ruling in *Cal. Dump Truck Owners Ass'n v. Davis* 10

II. Section 14501(c)(2)(A) Does Not Prohibit a Municipality from Enforcing Safety or Size and Weight Laws Enacted by a State 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

American Airlines, Inc. v. Wolens, 513 U.S. 219, 224 (1995) 11

Cal. Dump Truck Owners Ass'n v. Davis, 172 F.Supp.2d 1298 (E.D. Cal. 2001) ..3, 4, 6, 10

CSX Trans. v. City of Plymouth, Michigan, 86 F.3d 626 (6th Cir. 1996) 9

Field v. Mans, 516 U.S. 59 (1995) 4

Grand Trunk Western RR Company v. City of Fenton, 482 N.W.2d 706 (Mich. 1992) *cert. denied* 507 U.S. 1050(1993) 9

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992) 11

R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 546 (11th Cir. 1998) 9, 10

Russello v. United States, 464 U.S. 16 (1983) 5

Federal Statutes

49 U.S.C. § 14501 ..... 4, 5, 6

49 U.S.C. § 14501(c)(1) 3, 8, 9, 10, 11, 13, 14

49 U.S.C. § 14501(c)(2)(A) 3-6, 9-11, 13-14

State Statutes

Cal. Govt. Code § 21100(b) 2

Cal. Govt. Code § 21101(c) 3

Cal. Govt. Code § 21 9

Cal. Veh. Code § 35000 11

Cal. Veh. Code § 35701 3

Cal. Veh. Code § 35702 12

Cal. Veh. Code § 35712 3

Cal. Veh. Code § 35716 8

Municipal Ordinances

San Diego County Code § 72.234.29 7

San Jacinto Municipal Code § 10.12.010 7

Santee Municipal Code § 10.24.055 7

Court Rules

Sup. Ct. R. 37 5

Sup. Ct. R. 37.6 2

Miscellaneous

H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 85, 87 (1994), *reprinted in* 1994 U.S.S.C.A.N. 1759.....8

"Congress Prepares to Lighten Truckers' Regulatory Load," *Congressional Quarterly*, August 6, 1994....9

No. 01-419

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN,
AND BOBBIE DEAVERS
PETITIONERS,

V.

OURS GARAGE AND WRECKER SERVICE, INC., AND
THE TOWING AND RECOVERY ASSOCIATION OF OHIO,
RESPONDENTS.

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE *AMICUS CURIAE*
CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION
IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE[1]

The California Dump Truck Owners Association (hereinafter "CDTOA"), founded in 1941, is a California non-profit corporation. CDTOA is a state-wide trade organization with a membership that includes approximately 1500 motor carriers of property, i.e., dump trucking and construction trucking companies located throughout the State of California. CDTOA members are involved with hauling construction commodities and construction equipment. CDTOA membership accounts for approximately twenty-five percent (25%) of the construction trucking companies and seventy percent (70%) of the construction trucking equipment now operating within California.

The members of CDTOA are subjected to a myriad of local size and weight regulations throughout California imposing varying restrictions on their motor carrier operations. Those restrictions, in the form of permit fees or route restrictions imposed by local governments, result in a substantial increase in travel time and cost of operation for the members of CDTOA.

The California legislature has delegated to local governments the State's authority to license and regulate commercial vehicles. Cal. Govt. Code § 21100(b). By various statutes, the State of California has also delegated to local governments the authority to impose highway route controls or limitations, or prohibit the use of certain roads,

---

[1] Both the petitioners and respondents have consented to the filing of this brief. The letters of consent are on file with the Clerk's office. Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* hereby certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity, other than the *amicus*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

based on the size or weight of motor vehicles. *See* Cal. Veh. Code § 35701, Cal. Govt. Code § 21101(c), and Cal. Veh. Code § 35712.

Last year, CDTOA petitioned for, and obtained, a federal district court declaratory judgment finding several California statutory provisions delegating to local governments the authority to impose route controls or limitation based on the size or weight of the motor vehicle to be preempted by 49 U.S.C. § 14501(c)(1). *Cal. Dump Truck Owners Ass'n v. Davis*, 172 F.Supp.2d 1298 (E.D. Cal. 2001). In doing so, the district court, following the prior decisions of the Eleventh, Ninth, Sixth, and Fifth circuits, held that the "safety regulatory exception [found at 49 U.S.C. § 14501(c)(2)(A)] does not extend to local ordinances." *Id.* at 1303. The court continued to say, "By logical extension, the safety regulation exemption also does not extend to California Code provisions which authorize local ordinances." *Id.* The government defendants have appealed that ruling. *Cal. Dump Truck Owners Ass'n v. Davis*, *supra*, *appeal docketed*, No. 01-17435 (9th Cir., December 10, 2001).

The members of CDTOA seek to secure judicial enforcement of Congress' express preemption of the multitude of regulations and restrictions imposed by *local* California governments on their motor carrier operations. The decision of this Court in the case at bar will likely be determinative of the pending Ninth Circuit appeal in *Cal. Dump Truck Owners Ass'n v. Davis*, *supra*, and will dictate whether members of CDTOA will continue to be subject to oppressive, non-uniform local truck regulations. For those reasons, CDTOA has a direct interest in the issues raised in this case and submits this brief in support of affirmance of the decision below in order to assist the Court in addressing

fundamental legal issues in this case that are of paramount importance to motor carriers other than tow truck businesses. Because CDTOA is a party to the ongoing Ninth Circuit litigation, it is particularly well-positioned to address these issues in an informed and useful fashion.

SUMMARY OF THE ARGUMENT

CDTOA submits this brief as *amicus curiae* in support of affirmance. Its argument is limited to issues raised by Petitioners relating to the district court ruling in *Cal. Dump Truck Owners Ass'n. v. Davis*, 172 F.Supp.2d 1298 (E.D. Cal. 2001).

Affirmance of the Sixth Circuit's interpretation of 49 U.S.C. § 14501 will not lead to confusion or to the "odd" interpretation or "common sense" problems that concerned the Court in *Field v. Mans*, 516 U.S. 59 (1995). The Sixth Circuit's interpretation parallels the intent of Congress to alleviate intrastate motor carriers of the morass of local truck regulations in favor of uniform state-enacted regulations. Affirmance of the lower court's holding that the first clause of § 14501(c)(2)(A) does not permit a city to regulate with regard to the safety of tow trucks, will not, as a consequence of the logical extension of that holding to the second clause of § 14501(c)(2)(A), require "state legislature[s] to examine every street in every municipality [and] then enact routing rules appropriate to each." Pet. Br. 28.

Furthermore, § 14501(c)(2)(A) does not preclude local government enforcement of state laws relating to motor carrier safety, or highway routes or restrictions.

The decision of the Court of Appeals should be affirmed.

ARGUMENT

The central issue in this case is whether 49 U.S.C. § 14501 permits political subdivisions of States to regulate tow trucks in matters of safety. The determination of that issue is grounded primarily in the statutory construction of 49 U.S.C. § 14501. CDTOA asserts that the arguments in support of the construction of the statute advanced by the court below are adequately addressed by Respondents in their brief, and will not be repeated or restated herein. Sup. Ct. R. 37 (an *amicus curiae* brief that addresses matters already brought to the attention of the Court by the parties "burdens the Court" and is "not favored").

However, in support of their argument that the lower court's application of *Russello v. United States*, 464 U.S. 16 (1983) was in error, Petitioners have asserted that, in many ways, the *Russello* analysis leads to "common sense" problems. Pet. Br. 26. One of those problems, according to Petitioners, is that the lower court's reading of § 14501 as it applies to tow truck operations also undermines a city's ability to enact size and weight route restrictions. They argue that the same *Russello* analysis used by the Sixth Circuit in holding that the *first clause* of § 14501(c)(2)(A) does not permit a city to regulate with regard to the safety of tow trucks would logically apply to the *second clause* of § 14501(c)(2)(A) concerning "the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle." *Id.* Petitioners contend that if municipalities may not regulate highway routes within their own jurisdictions based on the size and weight of

vehicles, state legislatures would have to undertake a review of "every street in every municipality" to determine the need for route restrictions. They insist that the *Russello* inference leads to an "odd" interpretation. Pet. Br. 26. Because Petitioners rely, in part, upon the district court's ruling in *Cal. Dump Truck Owners Ass'n. v. Davis*, 172 F.Supp.2d 1298 (E.D. Cal. 2001), for support of that argument, CDTOA is compelled to respond because of its interest in the pending litigation on those issues.

I. Section 14501(c)(2)(A) Properly Undermines Local Size and Weight Route Regulations, to the Extent that Such Was Intended by Congress.

Petitioners state that, in addition to preempting the regulatory authority of local jurisdictions with respect to motor vehicles of property, the district court's interpretation of § 14501(c)(2)(A) "undercuts" a city's ability to enact its own size and weight route restrictions on motor vehicles. Pet. Br. 27-28. Although the petitioners' argument is somewhat overstated, it is nonetheless an accurate assessment of both the district court's interpretation which is, in turn, an accurate assessment of Congress' intent.

A. Congress Clearly Intended to "Undercut" a City's Ability to Enact or Enforce Its Own Size and Weight Laws.

Some factual background will serve to put the import of the law into perspective. The stifling effects of local government regulations upon the construction trucking industry is, perhaps, one of the best examples of the evils addressed by Congress when it enacted 49 U.S.C. § 14501. Construction trucking work is primarily contract-based. For example, a dump truck company will subcontract to a general contractor to deliver construction materials to, or haul

materials from, a construction site. The projected route of the dump truck company is to and from the construction site (Point A) to a land fill or quarry (Point B). Depending on the size of the construction project, the dump truck company can anticipate several trips each day between Points A and B for the duration of the contract. Many factors will dictate the most efficient route between Points A and B, including traffic volume, roadway design (e.g. four-lane divided highways are preferred to residential thoroughfares), roadway integrity, and distance between Point A and Point B. Of course, a construction trucking bid price is based, in part, upon the expectation that the most efficient route will be utilized by the construction trucking company during the duration of the contract.

The unfortunate experience of many construction trucking companies has been that, after a project is underway, a local government entity, acting pursuant to delegated state authority, will enact a local ordinance prohibiting, or somehow restricting, the use of the most efficient roadways by the construction trucking company. [2]

As should be evident, such road closures by local governments have a devastating financial impact on construction trucking. As a consequence of road closures, or restrictions, construction trucking companies are forced, on a daily basis, to resort to less efficient, circuitous routes for hauling between Points A and B that were not anticipated at the time of the bid. This necessarily increases their costs of

---

[2] *See, e.g.*, § 10.24.055 of the Santee Municipal Code (restricting the routes of trucks of more than fourteen thousand pounds to only ten streets within that municipality); § 10.12.010 of the San Jacinto Municipal Code (requiring truckers to pay a permit fee to use certain throughways); and § 72.234.29 of the San Diego County Code (restricting approximately five miles of Gopher Canyon Road to truck traffic under seven tons).

operation and diminishes, or eliminates, projected profit margins.[3]

It was against that background of operationally stifling and economically repressive — to use Petitioners phrase, "classically-local," — size and weight restrictions, that Congress enacted § 14501(c)(1) and deregulated the intrastate motor freight industry.

The public policy interests Congress sought to implement in enacting § 14501(c)(1) are set forth in the Conference Report:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition . . . and curtails the expansion of markets ... The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 103-677, at 85, 87 (1994), *reprinted in* 1994 U.S.S.C.A.N. 1759.

---

[3] Interestingly, the California legislature acknowledged the local dilemma faced by construction trucking companies described herein when it enacted Cal. Veh. Code § 35716, which provides that any ordinance adopted by a city to decrease weight limits shall not apply to vehicles operated by a construction contractor while in use on a *public works project* if the bids were opened prior to the adoption of the ordinance "unless an alternate *direct route* is provided substantially within and by the city enacting the ordinance." (Emphasis supplied).

Section 14501(c)(2)(A), providing that only *State governments* may continue to regulate in matters of truck safety, and highway routes based on size and weight, is a manifestation of the intent of Congress. The whole point of § 14501(c)(1) was to eliminate burdensome, costly, and duplicitous regulations that had been historically imposed upon intrastate motor carriers. *See, generally*, "Congress Prepares to Lighten Truckers' Regulatory Load," *Congressional Quarterly*, August 6, 1994 at 2236. In 1994, the construction trucking industry might have served as the poster child for an intrastate trucking industry burdened by a hodgepodge of local trucking regulations. Congress accomplished its objective of eliminating the sheer diversity of trucking regulations in § 14501(c)(1) by preempting all economic regulations of motor carriers of property, then consolidating truck safety regulations within a single governmental authority -- the States. There is certainly nothing "odd" or unusual about Congress doing that. *See, e.g., CSX Trans. v. City of Plymouth, Michigan*, 86 F.3d 626 (6th Cir. 1996) and *Grand Trunk Western RR Company v. City of Fenton*, 482 N.W.2d 706 (Mich. 1992) *cert. denied* 507 U.S. 1050 (1993)(Federal Railroad Safety Act prohibits local but not state regulation of train speeds).[4]

"[I]t is reasonable to assume that Congress decided that safety and insurance ordinances [and highway route restrictions based on size and weight] must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances would invariably create." *R. Mayer of Atlanta,*

---

[4] The California legislature has also expressed a policy favoring state-wide uniformity in motor vehicle regulations. Cal. Veh. Code § 21 provides that the state's motor vehicle laws, including the size and weight laws, shall be "applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein." *Id.*

Inc. v. City of Atlanta, 158 F.3d 538, 546 (11th Cir. 1998). A conclusion by this Court that States may delegate their preserved authority over motor carrier safety and, by logical extension, their authority with respect to highway route controls or limitations based on the size or weight of a motor vehicle, would completely eviscerate Congress' intent with regard to motor carrier regulation.

B. Petitioners Overstate the District Court's Ruling in *Cal. Dump Truck Owners Ass'n v. Davis*.

Petitioners state that the federal district court in *Cal. Dump Truck Owners Ass'n, supra*, applying the same logic as the Sixth Circuit in this case, held all state statutes purporting to delegate authority preempted and "ultimately invalidated *all* local traffic-control laws as applied to intrastate motor carriers." Pet. Br. 28. (emphasis in original). Petitioners suggest that under the Sixth Circuit's view of § 14501(c)(2)(A) a municipality may not even issue a motor carrier of property a citation for traveling the wrong way on a one-way street in violation of a municipal ordinance. Petitioners are simply wrong.

First, the district court's ruling in *Cal. Dump Truck Owners Ass'n, supra*, did not invalidate *all* local traffic-control laws as applied to intrastate motor carriers. That court only found certain California statutory provisions delegating to local governments the authority to impose route controls or limitation based on the size or weight of the motor vehicle to be preempted by 49 U.S.C. § 14501(c)(1). General laws relating to all motor vehicle operations, e.g. speeding and other "rules of the road," are not at issue in *Cal. Dump Truck Owners Ass'n*.

Secondly, local traffic-control laws of general application to all motorists are, if fact, not preempted by 49 U.S.C. § 14501(c)(1). Although Section 14501(c)(1) forbids local governments from enacting or enforcing local laws related to the price, route or service of any motor carrier of property, that is not to say that local governments may no longer regulate motor carriers of property in any manner whatsoever. In order to be preempted, the local law in question must have a "connection with or reference to" motor carriers of property. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). A local law may be "too tenuous, remote, or peripheral" to the preempted conduct to be implicated. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 224 (1995). Local traffic-control laws do not have a sufficient nexis to the price, route or service of motor carriers of property such that they are preempted under § 14501(c)(1). In other words, local traffic-control laws do not require an exception under 49 U.S.C. § 14501(c)(2)(A) in order to be enforceable by local governments; those laws simply are not preempted.

Petitioners also contend that unless local governments can continue to impose their own highway route controls or limitation based on the size or weight of the motor vehicle the States will be required to examine "every street in every municipality" to determine the need for highway route controls or restrictions. Pet. Br. 28. That alarmist contention is clearly misplaced. There is no more need for States to review and replace every preempted local truck size and weight law with a state law than there is a need for States to review and replace every preempted local truck safety law with a corresponding state law. Every State has already enacted uniform, state-wide vehicle size and weight laws. *See, e.g.*, Cal. Veh. Code § 35000, *et seq.* Those size and weight laws can be enforced by both state and city officials

(*see* II, below). In the event there may be a need for deviation from those uniform state-wide vehicle size and weight standards, based on a specialized local concern, a State could easily implement an administrative procedure through which a county or municipality might petition for a State-authorized highway route restriction in response to its local need. Importantly, and in keeping with Congress' expressed policy of eliminating inefficiencies and cost to intrastate motor carriers, all matters of highway route restrictions based on size and weight concerns would be centralized within the *State* government.

In fact, in California, such a procedure is already in place. Cal. Veh. Code § 35702 provides that no city may, by ordinance, prohibit the use of a state highway, or any highway not within its exclusive jurisdiction, by commercial vehicle or vehicles exceeding a maximum gross weight limit "until the ordinance has been submitted by the governing body of the local authority to, and approved in writing by, the Department of Transportation." *Id.* That existing mechanism for State review and approval of local vehicle size and weight restrictions could quite easily be extended to streets and highways that are within the exclusive jurisdiction of a city or county.

Petitioners cry that Congress would never have approved of such an "administratively awkward and ultimately counter-productive regime." Pet. Br. 28. Just to the contrary, however, in 1994 Congress eliminated the "classically-local" counter-productive regime, described above, in favor of uniform state size and weight regulations.

II. Section 14501(c)(2)(A) Does Not Prohibit a Municipality from Enforcing Safety or Size and Weight Laws Enacted by a State.

Petitioners suggest that, under the lower court's interpretation, *local* government police agencies could never enforce *state* safety laws. This is so, they argue, because the general preemption provision, § 14501(c)(1), mandates that "a State [or] political subdivision of a State ... may not enact or enforce a law [or] regulation ... having the force and effect of law related to a price, route, or service of any motor carrier [of property]." Petitioners would construe that general preemption clause to read that a municipality may no longer "enforce" *any* motor carrier law or regulation, even one enacted by a State. According to Petitioners, if the safety exception of § 14501(c)(2)(A) reinstates only *the State's* authority to "enact" and *"enforce"* laws regulating the safety of commercial motor vehicles, then those state safety laws can only be enforced by *state* police officials. Pet. Br. 26.

Petitioners' reading of § 14501(c)(1) is strained. The more reasoned construction of that clause is that a municipality may no longer enforce *its own* laws or regulations relating to the price, route or service of motor carriers of property, but is not foreclosed from enforcing state laws on safety, size and weight that are preserved to the States under § 14501(c)(2)(A).

Lending credence to the latter construction is Congress' use of the conjunctive phrase "enact or enforce." A city can only "enact" *municipal laws and regulations*. Therefore, reading the conjunctive phrase together, and not disjointed as have Petitioners, the more sensible construction of § 14501(c)(1) is that a political subdivision may not "enact or enforce a *[municipal]* law" relating to the price, route or

service of any motor carrier of property. But nothing in § 14501(c)(1) prohibits cities from enforcing the *State* safety or size and weight laws preserved to the States in § 14501(c)(2)(A).

CONCLUSION

The members of CDTOA, like many other intrastate motor carriers of property, have suffered too long under a cobweb of duplicitous, costly, inconsistent, and largely unnecessary, local regulations imposed on their intrastate trucking operations by cities and counties throughout the State of California. The judgment of the court below should be affirmed.

Respectfully Submitted:

Edward J. Hegarty
Hegarty Law Office
7181 Highway 193
Post Office Box 360
Georgetown, California 95634

Attorney for Amicus Curiae

March 21, 2002

No. 01-419

Supreme Court, U.S.
FILED
MAR 21 2002
CLERK

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, MITCHELL BROWN,
And BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC. AND
THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE VRC LLC, AUSTIN TOWING ASSOCIATION AND HOUSTON PROFESSIONAL TOWERS ASSOCIATION IN SUPPORT OF RESPONDENTS

JONATHAN BRUCE
LIVINGSTON & ASSOCIATES, P.C.
6464 Savoy, Suite 100
Houston, Texas 77036
(713) 667-2234

JAMES C. MOSSER
Counsel of Record
BYRON K. HENRY
JAMES C. MOSSER, INC.
17110 Dallas Parkway, Suite 290
Dallas, Texas 75248
(972) 733-3223

Attorneys for Amici Curiae in Support of Respondents

March 21, 2002

BEST AVAILABLE COPY

BOSTON, MASSACHUSETTS

INTEREST OF AMICI CURIAE VRC LLC, AUSTIN TOWING ASSOCIATION, AND HOUSTON PROFESSIONAL TOWERS ASSOCIATION*

Amicus VRC LLC ("VRC") is a limited liability company engaged in the business of towing and storage of motor vehicles for compensation in and around the Dallas/Fort Worth, Texas metropolitan area. VRC maintains offices, including tow trucks, in Dallas, Arlington, and Plano, Texas. VRC offers towing services to primarily private property owners who wish to remove *unauthorized or illegally parked vehicles, as well as trespassers*, from their property. VRC also provides towing services from the scene of motor vehicle accidents at the request of law enforcement and motor vehicle owners and operators. In addition, VRC is available to perform tows of disabled motor vehicles at the request of the owner or operator of the vehicle.

Amici Austin Towing Association ("ATA") and the Houston Professional Towers Association ("HPTA") are incorporated associations comprised of numerous towing companies and personnel providing towing services in and around Austin and Houston, Texas. Most of amici's members primarily provide towing services from accident scenes to cities and counties.

At present amici and their operations are regulated by the State of Texas Department of Transportation ("TXDOT") through Chapters 683, 684, and 685. Amici are also regulated by many cities in which they operate tow trucks. Each municipality has its own guidelines, in addition to TXDOT, regarding vehicle equipment, permits, vehicle inspections, driver qualifications, application fees, and regulations requiring that towing companies maintain or contract with a storage facility within its city limits.

---

* Counsel for Amici indicated on the cover of this Brief authored this Brief in whole. No other person or entity other than Amici made a monetary contribution to the preparation or submission of this Brief.

Because Congress has expressly allowed States and political subdivisions to set the maximum price for tows performed without the prior consent of the owner or operator (which make up the vast majority of tows performed by amici), it is vital that the remainder of Congress' legislation to deregulate motor carriers and foster a free market in towing services, be protected from local efforts to regulate amici. Amici currently provide towing services in excess of seventy-five jurisdictions. Amici fear that it will become impractical if not impossible to comply with the myriad of regulations proposed and enacted by local governmental entities.

Amici ask this Court to protect the free market for motor carriers envisioned by Congress and affirm the court of appeals holding that 49 U.S.C. § 14501(c)(2)(A) does not authorize local regulation of motor carriers of property.

TABLE OF CONTENTS

INTEREST OF AMICI i

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT 1

I. TOWING INDUSTRY 3

II. SCOPE OF PREEMPTION 7

A. The Plain Language Declares Congress' Intent 7

B. The Legislative History Confirms Congress' Intent 10

C. Congressional Intent Overcomes Presumption Against Preemption of Traditional Police Powers 12

III. SCOPE OF EXCEPTIONS 15

A. Plain Language of § 14501(c)(2)(A) 15

B. Role of Secretary of Transportation in Statutory Scheme 22

C. Court of Appeals' Construction Furthers Congress' Deregulatory Purpose 24

D. *Mortier* Does Not Mandate Contrary Result 27

IV. WRECK CHASING 28

V. CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d. Cir.), *cert. denied*, 528 U.S. 568 (1999) ..... *passim*

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 8, 13

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 16

Californians for Safe and Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) 14

Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686 (5th Cir. 1999) 4, 5, 6, 6n, 10

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 12, 13

CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996) 18, 19

CSX Transp., Inc. v. City of Thorsby, 741 F.Supp. 889 (M.D. Ala. 1990) 19

Deerskin Trading Post, Inc. v. United Parcel Serv. of Amer., Inc., 972 F.Supp. 665 (N.D. Ga. 1997) 11

Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) 18, 19

Estate of Cowart v. Niklos Drilling Co., 505 U.S. 469 (1992) 7, 16

Grand Trunk W. R.R. v. City of Fenton, 439 N.W.2d 706 (Mich. 1992), *cert. denied*, 507 U.S. 1050 (1993) 18, 19

Harris Co. Wrecker Owners for Equal Oppor. v. City of Houston, 943 F.Supp. 711 (S.D. Tex. 1996) 11

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 9

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 8, 11, 13, 14

National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 20

Ohio Mfrs. Ass'n v. City of Akron, 801 F.2d 824 (6th Cir. 1986) 18

Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) 6n, 9n, 10, 25

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 8

R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999) 4, 9n, 11, 17, 25

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13

State v. Foley, 950 S.W.2d 781 (Tex.App.–Austin 1997, no writ) 14

Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir. 2001), *reh'g denied*, 266 F.3d 342, *pet. for cert. filed*, 70 U.S.L.W. 3465 (U.S. December 13, 2001) (No. 01-1028) 6, 7, 7n, 9, 9n, 25

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001) 6n, 9n, 10, 20, 25

United Gas Pipeline Co. v. Terrebonne Parish Police Jury, 445 F.2d 301 (5th Cir. 1971) 19

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 20

Whitten v. Vehicle Removal Corp., 56 S.W.3d 293 (Tex.App.-Dallas 2001, pet. granted) 22

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 2, 19, 20, 20n, 27

Wolens v. American Airlines, Inc., 626 N.E.2d 205 (Ill. 1993) 13, 14

CODES:

United States Code

7 U.S.C. § 136 ..... 27, 27n
29 U.S.C. § 1144(a) 8
49 U.S.C. § 11501(h) 7
49 U.S.C. § 13101 23
49 U.S.C. § 13102(12) 3
49 U.S.C. § 13102(18) 16, 20

49 U.S.C. § 13506(b) 23
49 U.S.C. § 13506(b)(1) 23
49 U.S.C. § 13506(b)(3) 23
49 U.S.C. § 14501 ..... 1, 14, 27, 28
49 U.S.C. § 14501(a) 2, 17, 23
49 U.S.C. § 14501(b) 2, 17, 23
49 U.S.C. § 14501(c) 3
49 U.S.C. § 14501(c)(1) ..... *passim*
49 U.S.C. § 14501(c)(2)(A) ..... *passim*
49 U.S.C. § 14501(c)(2)(B) 15
49 U.S.C. § 14501(c)(2)C) ..... *passim*
49 U.S.C. § 14501(c)(3)(A) 17, 18
49 U.S.C. § 14501(c)(3)(B) 17
49 U.S.C. § 14501(c)(3)(C) 17
49 U.S.C. § 20101 ..... 19n
49 U.S.C. § 30102(a)(8) 21
49 U.S.C. § 31132(7)-(9) 20
49 U.S.C. § 31141 20
49 U.S.C. § 41713(a) 16
49 U.S.C. § 41713(b)(1) 8
49 U.S.C. § 41713(b)(4) 8
49 U.S.C. § 41713(b)(4)A) 11
49 U.S.C. § 41713(b)(4)(B)(I) 17

MISCELLANEOUS:

H.R. Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715 11

H.R. Rep. No. 104-311 (1995), *reprinted in* 1996 U.S.C.C.A.N. 793 ..... 26, 26n

Pub. L. No. 91-458, Title II, 84 Stat. 1705 (Oct. 24, 1978) 19n

Pub. L. No. 103-305, 108 Stat. 1569 (1994) 24

State of Texas Department of Transportation
Chapters 683, 684, and 685 i

Columbus, Ohio, City Code § 549.02 29

Dallas City Code Chapter 15D 29

Dallas City Code Chapter 48A 29

Jonathan E. Bruce, *Towing Law and You; Towing and Storage Fees*, Towing and Recovery Phootnotes, November 2001 at 38 ..... 3, 4

SUMMARY OF THE ARGUMENT

The Sixth Circuit was correct, along with the Fifth, Eleventh, and Ninth Circuits, in determining that 49 U.S.C.A. § 14501(c)(1) preempts local regulation related to the price, route, or service of motor carriers of property. The court of appeals was also correct in holding that Congress' express reservation of authority to States to regulate motor vehicle safety does not encompass the authority of States to delegate this authority to political subdivisions.

The plain language of the statute expressly declares Congress' intent to deregulate motor carriers of property to the same extent to which it deregulated air carriers and motor carriers affiliated with air carriers. Every court that has considered this question has held that § 14501(c)(1) preempts state and local regulations that have more than a tenuous or remote effect on motor carriers' prices, routes, and services. In addition, the legislative history of § 14501 confirms this intent. The court of appeals construction furthers Congress express deregulatory purpose. Petitioners' reliance on the presumption against federal preemption of traditional state police powers is misplaced because the language and purpose of the general preemption clause was intended to displace the very "traditional police powers" Petitioners argue are saved from preemption.

Congress reserved authority of States to continue to regulate motor vehicle safety among other things. Contrary to Petitioners' implication, however, courts have held on numerous occasions that a specific grant or reservation of authority to States by Congress did not necessarily preserve the authority of States to delegate their authority to political subdivisions. Petitioners' vision of Congress' intent would permit cities and counties to regulate all motor carriers of property to the same extent Petitioners seek to regulate Respondents. Further, the alleged "safety" exception, under which Petitioners seek to regulate, is actually a more limited exception for safety regulation *with respect to motor vehicles*. It is not, al-

though often mischaracterized as such, an exception for "public safety" or "motor carrier safety." Petitioners' construction of § 14501(c)(2)(A) would allow the exception to swallow the rule and lead to the absurd and irrational result that Congress has deregulated the motor carrier industry by authorizing thousands of separate jurisdictions to regulate transport companies.

Petitioners' and amicus United States' reliance on the Secretary of Transportation's role is also misplaced. Even with local regulation preempted, the Secretary still maintains a vital role in ensuring that non-preempted laws of general application, touching safety or other areas, do not impose an unreasonable burden on intrastate motor carriers or impede the transportation policy of the United States. The Secretary is also charged with administering and monitoring other provisions of the ICCTA, including the preemption provisions at §§ 14501(a) and 14501(b).

This Court's decision in *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) does not mandate reversal of the court of appeals' holding. Mortier does not establish a general rule of statutory construction that reservation of regulatory authority to States must always include authority to delegate to political subdivisions even in the face of contrary congressional intent.

Finally, Petitioners' contention that Respondents' construction would prohibit local enforcement of all traffic regulations is incorrect. Traffic laws of general applicability that only remotely or tenuously affect prices, routes, or services are not preempted by § 14501(c)(1) in the first place. Thus, Petitioners' contention as to the enforcement scope of § 14501(c)(2)(A) is irrelevant. Likewise, Petitioners' arguments concerning "wreck chasing" are not sufficient to overcome Congress' express directive. Enforcement of State laws empowering peace officers to control accident scenes, compel obedience to lawful directives of a peace officer, order the removal of vehicles that are hindering or blocking traffic, or general traffic laws provide a few examples of State regulations that would be saved from preemption by § 14501(c)(2)(A)

in the event a court found these generally applicable traffic laws preempted by § 14501(c)(1) in the first instance. Also, numerous courts have recognized the market-participant exception to general preemption which allows cities to contract with one or more companies and set reasonable standards for performing police ordered tows from accident scenes. If cities choose not to participate in the market, States remain free to enact and enforce laws that are not generally preempted by § 14501(c)(1) or pursuant to its authority to regulate under § 14501(c)(2)(A).

I. TOWING INDUSTRY

Before addressing the specific question as to the scope of § 14501(c)'s preemption and its exceptions, amici will provide a brief description of the current towing industry and its place in the vast market of motor carriers of property. Towing companies are motor carriers of property under Congress' definition. 49 U.S.C. § 13102(12). Since the adoption of the limited exception allowing States and political subdivisions to set the maximum price for nonconsensual tows effective January 1, 1996, every court that has addressed the question has held that motor carriers providing removal, transport, and storage services for motor vehicles were motor carriers of property for purposes of § 14501(c). In addition, neither the express preemption clause at § 14501(c)(1), nor the § 14501(c)(2)(A) exception at issue here, distinguish between towing companies providing transportation and storage of motor vehicles from any other motor carrier of property.

The motor vehicle towing industry typically defines and divides towing into two categories, namely, private property towing and accident towing. Within those two categories, the removal and storage of motor vehicles is classified either as a consent tow or a nonconsent tow, depending on who requests the services of the towing company. *See* Jonathan E. Bruce, *Towing Law and You;*

Towing and Storage Fees, Towing and Recovery Phootnotes, November 2001 at 38.

Consent tows occur when the owner of a vehicle expressly or implicitly requests towing services to be provided by a specific towing company and enters into a private contract with the towing company for the services. *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 541 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). In consent towing situations, the relationship between the vehicle owner and the towing services is contractual. Like other transactions between a consumer and a motor carrier of property, the vehicle owner and the tow truck operator may negotiate the terms and price for the service, and enter into a contract for the removal and storage of the vehicle. A consensual tow can initiate from a variety of locations including private property or public streets and roadways, including the scene of a motor vehicle accident.

Nonconsent tows, on the other hand, are performed without the consent of the vehicle owner or operator.[2] Due to the absence of the vehicle owner or operator to either employ a towing service or the unwillingness of the vehicle owner or operator to have the vehicle towed, a third party, often a private property owner or law enforcement agent, employs the towing company to remove and store the vehicle. *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 694 (5th Cir. 1999). In the nonconsent towing scenario the third party who requests the tow is considered the consumer of the towing service despite the fact that the vehicle owner or operator is the party responsible for paying the towing and storage

---

[2] While not expressly defining nonconsent, 49 U.S.C. § 14501(c)(2)(C), does provide a contextual definition for the term:

> C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

charges. *Id.* at 697. A nonconsent tow, like a consent tow, can initiate from private property, public streets, or the scene of a motor vehicle accident.

Private property consent towing is the towing of a vehicle from private property at the request of or with express or implied consent of the vehicle owner or the person in charge of the vehicle. This type of towing typically takes place when a vehicle is disabled on private property, resulting in the vehicle owner employing a tow truck company to tow their vehicles to a location of their choosing. Private property nonconsent towing usually consists of the towing of trespassers, unauthorized vehicles, or illegally parked vehicles at the request of the property owner without the consent of the vehicle owner. This type of towing typically takes place from commercial parking facilities, *e.g.*, shopping centers, restaurants, apartment complexes, *etc.* Commercial property owners with limited available parking for their customers employ towing companies to remove unauthorized vehicles from their property in an attempt to keep fire lanes, entrances, and assigned and handicap parking spaces clear,

Police-ordered tows or accident towing typically involves situations in which the vehicle is in need of towing due to an accident or mechanical failure on a public roadway. As stated above, the resulting tow can be either consensual or nonconsensual. Typically, there are two different towing scenarios that occur at the scene of a motor vehicle accident. Consent tows from accident scenes occur provided the vehicle driver is not seriously injured, remains at the scene, and is able to employ a towing service. Nonconsensual tows from accident scenes typically result when the vehicle driver, due to injury or other reasons, leaves the scene or is unable to select a towing service, thus leaving law enforcement to select and employ a towing service.

The only court to specifically address and define the terms consent and nonconsent towing as applied to towing from the scene of a motor vehicle accident has been the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v.*

City of Bedford, Texas, 180 F.3d 686 (5th Cir. 1999), and *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *reh'g denied*, 266 F.3d 342, *pet. for cert. filed*, 70 U.S.L.W. 3465 (U.S. December 13, 2001)(No. 01-1028). In *Cardinal* the court defined nonconsent towing and why, under the "market-participant" doctrine, police-ordered nonconsensual tows from the scene of a motor vehicle accident escaped preemption by 49 U.S.C. § 14501(c)(1).[3] The Fifth Circuit in *Cardinal*, stated that a true non-consent tow occurs when "the owner of the vehicle is unwilling or unable to specify a towing company." *Cardinal*, 180 F.3d. at 694. Nonconsensual towing does not involve any opportunity for market interaction on the part of the owner of the vehicle and the towing company. *Cardinal*, 180 F.3d at 696.[4] Often in an accident situation, a law enforcement officer is confronted with a vehicle in need of towing and no vehicle owner to make arrangements to have the vehicle towed.[5] In these instances the city, as opposed to the vehicle owner, becomes the party entering the market for the procurement of towing services.

In *Stucky* the court of appeals clarified the distinction between consent and nonconsent towing from the scene of a motor vehicle accident. The Fifth Circuit concluded that when the market actor (vehicle operator) is present and wishes to employ a towing company of his own choosing, the removal of the vehicle is consensual.

---

[3] Following the decision in *Cardinal*, the Courts of Appeals for the Sixth and Ninth Circuits have both held that city nonconsensual towing ordinances as applied to police-ordered tows from accident scenes are exempt from preemption based on a municipal-proprietor/market-participant analysis. *See Petrey v. City of Toledo*, 246 F.3d 548, 559 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1049 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001).

[4] This fact no doubt contributed to Congress' decision to add an exception allowing States *and political subdivisons* to set the maximum price for nonconsensual tows. *See infra*, note 12.

[5] The towing of abandoned vehicles, prisoner vehicles, illegally parked vehicles, and vehicles impounded by the police would also fall under the category of nonconsensual towing.

Stucky, 260 F.3d at 436. Although the vehicle owner may be required by law to remove their inoperative vehicle from the public roadway, if the vehicle owner is present and able to select a towing service, the vehicle owner or operator remains the market participant. Thus, regulation by the city could not be saved from preemption under the "market participant" doctrine. *Stucky*, 260 F.3d at 438-39.[6] Upon this backdrop, amici address the scope of preemption and the exceptions to preemption in 49 U.S.C. § 14501(c)(1).

II. SCOPE OF PREEMPTION

A. The Plain Language Declares Congress' Intent

Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA") effective January 1, 1995 in an effort to, among other things, deregulate the motor carrier industry. 49 U.S.C. § 11501(h) (recodified as amended at 49 U.S.C. § 14501(c)). Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA") effective January 1, 1996, which amended the FAAAA. 49 U.S.C. § 14501(c)(1).

The Court's analysis begins with the plain language of the statute. *Estate of Cowart v. Niklos Drilling Co.*, 505 U.S. 469, 475 (1992). The ICCTA provides in pertinent part:

> c) Motor carriers of property.--
> (1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor

---

[6] The Fifth Circuit also noted that the City could not transform consent tows into nonconsent tows simply by defining all accident tows as nonconsent tows despite the vehicle owner's willingness or ability to select a towing company. *Stucky*, 260 F.3d at 434-35 & n.11; *Stucky*, 266 F.3d at 343 (opinion on rehearing).

> carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Although this Court has not had occasion to construe the ICCTA, the Court is not without guidance. Congress has used the phrase "related to" in two other statutes intended to preempt state laws and regulations. Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1144(a); Airline Deregulation Act ("ADA") 49 U.S.C. § 41713(b)(1) & (b)(4).

In construing the phrase "related to" for the first time in ERISA, this Court recognized the phrase was "deliberately expansive" and "conspicuous for its breadth." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). Congress used identical language in the ADA. 49 U.S.C. § 41713(b)(4). This Court has construed the preemptive language of the ADA on two previous occasions. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In *Morales*, this Court held that the phrase "related to" expressed a "broad preemptive purpose." *Morales*, 504 U.S. at 383. The Court gave the phrase "related to" its ordinary and common meaning, finding Congress intended to preempt laws or regulations that have a connection with or reference to airline prices, routes, or services. *Id.*

Likewise, in *Wolens*, this Court confirmed Congress' broad purpose when it held that Illinois' Consumer Fraud Act could not be enforced against airlines to the extent that the action related to the airlines' prices, routes, or services. *Wolens*, 513 U.S. at 226-28. Thus, this Court has been consistent that the phrase "related to" indicates Congress' intent to preempt enactment or enforcement of laws or regulations that have a connection with or reference to the prices, routes, or services of the affected industry.

The ICCTA, like the ADA, preempts state and local laws or regulations that "relate to" the prices, routes, or services of motor carriers of property. 49 U.S.C. §

14501(c)(1). It is undisputed that the regulations enacted by Petitioners "relate to" the price, route, or service of Respondents. Nevertheless, the Court has stated that specific provisions of a statute should be interpreted within the context of the entire statutory scheme. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The language employed by Congress evinces a clear intent to preempt all state and local regulations related to the prices, routes, or services of motor carriers of property save for express exceptions discussed below.[7]

Despite express language to the contrary, the Second Circuit focused on ICCTA's preemption of *economic* regulations. *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 776 (2d. Cir.), *cert. denied*, 528 U.S. 568 (1999). Had Congress intended to preempt only state and local *economic* regulations pursuant to § 14501(c)(1), § 14501(c)(2)(A) would have been unnecessary. Section 14501(c)(1) makes no distinction between state and local safety regulations and state and local economic regulations. At some level, all safety regulations relate to and indirectly affect prices; thus are also economic in nature. *Stucky*, 260 F.3d at 445-46.

As will be discussed *infra* at II.A., the so called "safety" exception is in fact a more limited exception for the "safety regulatory authority of a State *with respect to motor vehicles*." 49 U.S.C. § 14501(c)(2)(A) (emphasis added). Prior to enactment of the FAAAA, state and local governments regulated motor carriers for, among other

---

[7] Every circuit court of appeals that has construed 49 U.S.C. § 14501(c)(1) has held that local regulation of towing services is preempted by § 14501(c)(1). Upon determining the regulations were preempted, each court proceeded to examine the regulations in light of the exceptions, specifically § 14501(c)(2)(A). *Stucky v. City of San Antonio*, 260 F.3d 424 (2001),*reh'g denied*, 266 F.3d 342 (5th Cir. 2001), *pet. for cert. filed*, 70 U.S.L.W. 3465 (U.S. December 13, 2001)(No. 01-1028); *Petrey*, 246 F.3d at 559; *Tocher*, 219 F.3d at 1049; *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d. Cir.), *cert. denied*, 528 U.S. 568 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999).

things, consumer protection, public convenience or necessity, public safety, or motor vehicle safety pursuant to their general police powers. It was necessary for Congress to include an express exception reserving the authority of States proper to continue to regulate motor vehicle safety in light of § 14501(c)(1)'s general preemption provision. Had Congress intended to preempt only economic regulation of motor carriers, Congress could have used language other than language identical to the ADA.

This point is bolstered by the fact that, in addition to motor vehicle safety, Congress excepted the authority of a State to impose highway route controls, limitations on the size and weight of vehicles, or the hazardous nature of the cargo, along with State requirements regarding minimum insurance requirements and financial responsibility. 49 U.S.C. § 14501(c)(2)(A). These provisions exclude both safety (hazardous cargo) and economic (insurance) regulations. The inclusion of these limited exceptions touching safety and economic concerns indicates that Congress intended § 14501(c)(1) to preempt all laws related to price, route, or service whether driven by safety or economic concerns. It is clear from the plain language of the statute that § 14501(c)(1), on its face, preempts all State and local laws or regulations related to prices, routes or services of motor carriers of property subject to the narrow exceptions to be discussed below.

B. The Legislative History Confirms Congress' Intent

It is undisputed that by enacting § 14501(c)(1), Congress intended to deregulate motor carriers of property subject to narrow exceptions. *See Petrey*, 246 F.3d at 563 (purpose of statute to encourage market forces by elimination of a myriad of complicated and conflicting regulations); *Tocher*, 219 F.3d at 1048 (purpose of statute to deregulate motor carrier industry because disparate regulation is inefficient and reduced competition and innovation); *Cardinal*, 180 F.3d at 695 (purpose of statute is elimination of state and local regulation that

reduces competition and curtails expansion of markets); *Ace*, 171 F.3d at 772 (purpose of statute was to free motor carrier industry from state and local regulation); *Mayer*, 158 F.3d at 544 (purpose of statute is to foster increased competition in the motor transportation industry by eliminating a tangled web of state and local regulations).

In addition to employing the same plain language, the legislative history confirms Congress' intention that the scope of preemption pursuant to 49 U.S.C. § 14501(c)(1) be identical to that of 49 U.S.C. § 41713(b)(4)(A), the general preemption provision contained in the ADA. The House Conference Report on the FAAAA states that the preemption provision of 14501(c)(1) "is identical to the preemption provision deregulating air carriers . . . and is intended to function in the exact same manner with respect to its preemptive effects." H.R. Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. The conference report also states that the "conferees do not intend to alter the broad interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines*." *Id.* at 83, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755. Courts have repeatedly resorted to interpretation of the ADA's preemption clause in construing the general preemption provision contained in the ICCTA. *See, e.g., Ace*, 171 F.3d at 773; *Mayer*, 158 F.3d at 545 n.5; *Deerskin Trading Post, Inc. v. United Parcel Serv. of Amer., Inc.*, 972 F.Supp. 665, 668-72 (N.D. Ga. 1997); *Harris Co. Wrecker Owners for Equal Oppor. v. City of Houston*, 943 F.Supp. 711, 725 (S.D. Tex. 1996).

Amicus United States in support of Petitioner, like the Second Circuit in *Ace*, argues that the legislative history indicates that Congress only intended to preempt *economic* regulation as opposed to *safety* regulation. Brief of Amicus Curiae United States at 23; *Ace*, 171 F.3d at 774. This contention fails because Congress did not make this distinction in the plain language of § 14501(c). In addition, the fact that Congress added an exception for State motor vehicle safety regulation,

among other things, confirms that Congress was well aware that the breadth of § 14501(c)(1)'s "related to" preemption language, as construed by this Court in the past, could preempt safety regulations.

Despite the narrow split between the Second Circuit and the Fifth, Sixth, Ninth and Eleventh Circuits regarding the scope of § 14501(c)(2)(A), there seems to be general agreement among State and federal courts that the scope and purpose of 49 U.S.C. § 14501(c)(1) was to deregulate the motor carrier industry subject to narrow exceptions to be discussed below.

C. Congressional Intent Overcomes Presumption Against Preemption of Traditional Police Powers

Petitioners rely heavily on the presumption against federal preemption of state laws and traditional state police powers. This reliance is misplaced for several reasons. The court of appeals in *Ace* based its starting presumption on its treatment of ERISA preemption. *Ace*, 171 F.3d at 773. This presumption is overcome when, as in § 14501(c)(1), Congress undoubtedly intended to supplant all state and local laws. Cases involving Congress' intention to preempt state law, especially in field preemption cases, lend themselves to the starting presumption that Congress did not intend to supplant state law because in field (or implied) preemption cases, courts are required to determine *whether* Congress intended to preempt as opposed to the *extent* of preemption. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (opinion of Blackmun, J.).

On the other hand, however, it is not appropriate to apply this presumption in *express preemption* cases where Congress was clear and unambiguous as to the scope and purpose of preemption. It would be an odd exercise indeed to measure § 14501(c)(1) against a presumption that Congress did not intend to supplant state and local laws. To do so would require a court to begin its analysis by presuming Congress did not intend to

preempt state law despite Congress' express directive to the contrary. Presumably, that is why this Court, in analyzing the *identical preemptive language* from the ADA, did not apply (or even mention) this presumption in *Morales* or subsequently in *Wolens*. For this reason, it is inappropriate when construing § 14501(c)(1) to begin with the presumption that Congress did not intend to supplant state and local laws.

This Court did, however, make clear in *Cipollone* that "the historic police powers of the States [are] not to be superseded unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As noted above, this presumption boils down to simply that courts will not assume Congress intended to preempt state laws unless Congress expressly does so, or impliedly does so by occupying the field with its own regulation, or states pass laws that conflict with federal law. There is no dispute in this case that Congress' manifest purpose was to supersede state and local laws. Therefore, the presumption that State laws will not be superseded unless Congress clearly says so is overcome by the fact that Congress, in plain language, said so.

The Second Circuit in *Ace* also made a distinction that regulations imposing only "incidental economic burdens" were not preempted. *Ace*, 171 F.3d at 774. The *Ace* court, however, failed to explain how this finding shielded the regulations from express preemption. The "incidental burden" analysis seems akin to this Court's statement in *Morales* that "some state actions may affect [airline fares] in too tenuous, remote or peripheral a manner to have pre-emptive effect." *Morales*, 504 U.S. at 390 (internal quotations omitted). This Court's statement in *Morales* clearly contemplates a law or state action that would escape the general preemption clause in the first instance. *Id.* (stating with respect to "obscene depictions that "the connection would obviously be far more tenuous."). This point is made crystal clear by this Court's treatment of the Illinois Supreme Court's decision in *Wolens v. American Airlines, Inc.*, 626 N.E.2d 205,

208 (Ill. 1993), holding that frequent flyer programs were not "essential to but merely peripheral to the operation of an airline." *Wolens*, 513 U.S. at 226 ("*Morales*, we are satisfied, does not countenance the Illinois Supreme Court's separation of matters essential from matters unessential to airline operations.") (internal quotations omitted).

In construing § 14501, the court of appeals in *Ace* erred when it balanced the "competing interests" of the presumption against preemption of historic state police powers and the "incidental economic burden" of otherwise preempted regulations. *Ace*, 171 F.3d at 774. Courts are not free to balance competing interests in the face of a clear and unambiguous directive from Congress. Otherwise, Congress' directive would have little force. Congress has weighed the competing interests involved and has decided in favor of deregulating motor carriers of property by expressly preempting state and local regulations in spite of any presumptions to the contrary.

In conducting its balancing act, the court of appeals in *Ace* incorrectly applied this Court's statement in *Morales* as an exception to the express preemption clause. This Court's statement in *Morales* regarding a state law or action that may be too tenuous or remote to be preempted assists courts in determining Congress' intent as to the scope of *whether* a law "relates to" the preempted field. *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). It does not establish an exception to express preemption. *See id.*; *see also State v. Foley*, 950 S.W.2d 781, 786 (Tex.App.–Austin 1997, no writ) ("Saying state action is too remote, tenuous, or peripheral to fall within a deregulation statute is just another way of saying the legislature did not intend to prohibit the state action of which the plaintiff complains."). In other words, if Congress intended to preempt the subject regulations, the burden imposed on the targeted industry by the regulations is irrelevant. Because it is undisputed that the regulations enacted by Petitioner "relate to" the

prices, routes, or services of motor carriers and are not "too tenuous or remote" to be preempted, the court of appeals' opinion should be affirmed unless Petitioners demonstrate the challenged regulations fall into one of the exceptions contained in statute.

III. SCOPE OF EXCEPTIONS

The statute in question contains exceptions to its express preemption clause. First, it provides an exception for states to enact safety regulations with respect to motor vehicles, financial responsibility and insurance requirements, and highway route restrictions based upon the size or weight of the vehicle, or the hazardous nature of the cargo. 49 U.S.C. § 14501(c)(2)(A). It also provides an exception for transportation of household goods. 49 U.S.C. § 14501(c)(2)(B). Finally, it provides an exception allowing states *and* political subdivisions of states to regulate the price of transportation by motor carrier if such transportation is provided without the prior consent of the owner. 49 U.S.C. § 14501(c)(2)(C).

A. Plain Language of § 14501(c)(2)(A)

The Sixth Circuit, following the opinion of a previous panel, along with the Fifth, Ninth, and Eleventh Circuits, have all held that § 14501(c)(2)(A) does not allow, among other things, local regulation of motor carriers. The specific exception at issue in this case provides:

> (2) Matters not covered.--Paragraph (1)
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of

> financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A).

As noted above, courts begin by looking at the plain language of a statute giving terms their ordinary meaning. If Congress' intent is clear from the language of the statute, the court need look no further. The judicial inquiry is complete. *Cowart*, 505 U.S. at 475. Petitioner City of Columbus is not a State. "State" is defined for purposes of the ICCTA as "the fifty States of the United States and the District of Columbia."). 49 U.S.C. § 13102(18). By its plain language, applying the definition supplied by Congress, the exception does not appear to preserve the regulatory authority of political subdivisions. Therefore, the regulations enacted by Petitioners appear to be preempted. Further inquiry by this Court, if necessary, will provide confirmation that Congress did not intend to allow continued regulation of motor carriers by political subdivisions when it deregulated the motor carrier industry.

First, as noted above, Congress defined *State* for purposes of the ICCTA. 49 U.S.C. § 13102(18). Congress is well aware of the importance of defining key terms to be included in statutes. For example, Congress included a definition of *State* in the ADA that did *not* encompass political subdivisions. 49 U.S.C. § 41713(a). Further, as pointed out by the United States in support of Petitioners, Congress defined *State* to include political subdivision in other sections of the statute where Congress intended to depart from the definition of *State* to be generally applied throughout the ICCTA. See Brief of Amicus Curiae United States at 27.

Second, Congress intentionally omitted reference to political subdivisions of States in § 14501(c)(2)(A). *See generally BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted). Congress included seven express references to the regulatory authority of political subdivisions. 49 U.S.C. § 14501(a), 14501(b), 14501(c)(1), 14501(c)(2)(C), 14501(c)(3)(A), 14501(c)(3)(B), and 14501(c)(3)(C). Section 14501(c)(2)(A) is the only subsection of the statute where Congress directly authorized *State* regulatory authority without also invoking the authority of the States' *political subdivisions*.

The Eleventh Circuit addressed this omission:

> We find it unlikely that this omission reflects a drafting error because a similar preemption provision contained in the Airline Deregulation Act, 49 U.S.C. § 41713(b)(4)(B)(I), contains the same omission. For these reasons, we view Congress' omission of a reference to political subdivisions from § 14501(c)(2)(A) as a manifestation of Congress' intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1).

Mayer, 158 F.3d at 545 (internal quotation marks omitted).

Section 14501(c)(3)(A) also supports the contention that Congress intentionally omitted political subdivisions from 14501(c)(2)(A). Section 14501(c)(3)(A) provides:

> Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to–
>
> (i) uniform cargo liability rules,
>
> (ii) uniform bills of lading or receipts for property being transported,
>
> (iii) uniform cargo credit rules,
>
> (iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or
>
> (v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law regulation, or provision meets the requirements of subparagraph (B).

While §14501(c)(2)(A) does not "restrict the safety regulatory authority of a State," § 14501(c)(3)(A) does not "affect any authority of a State." This distinction is crucial because Petitioners argue that the "safety regulatory authority of a State" is commonly understood as encompassing a State's power to delegate authority to its political subdivisions. Regardless of the breadth of States' "safety regulatory authority," it cannot be said to be broader than "any authority of a State." Thus, had Congress understood "safety authority" to include political subdivisions, surely it would have intended "any authority" to also include political subdivisions. Nevertheless, Congress felt it necessary to include *political subdivisions* when it declared that the general preemption clause shall not affect *any* authority of a *State*. 49 U.S.C. § 14501(c)(3)(A).

Third, despite Petitioners' implication to the contrary, this is not the first time a court has construed the term "State" with relation to regulatory authority and held that it did not include the authority of political subdivisions or the authority of States to delegate authority to their political subdivisions. The United States Courts of Appeal for the Fifth and Sixth Circuits, and other state and federal courts, have faced this issue with regard to similar deregulatory statutes and held that reservation of authority to *States* does not necessarily encompass delegation of that authority to their political subdivisions. *See, e.g., CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996) (holding safety exception granted exclusively to "States" in the Federal Railway Safety Act ("FRSA") did not apply to municipalities); *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 829 (6th Cir. 1986) (holding omission of political subdivisions in preemption provision of Occupational Safety and Health Act ("OSHA") was intentional); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) (holding same with regard to FRSA); *Grand Trunk W. R.R. v. City of Fenton*, 439 N.W.2d 706 (Mich. 1992), *cert. denied*, 507 U.S. 1050 (1993) (holding FRSA safety exceptions apply to State only and not to local governments).

In *Donelon*, local officials claimed authority to act under a statutory exception allowing *State* safety regulations in the Federal Railway Safety Act[8] ("FRSA"). *Donelon*, 474 F.2d at 1112-113. The Fifth Circuit did not analyze the regulations because, as a threshold matter, the court held that the parish officials of the local government were not a "State" for purposes of the FRSA and therefore did not fit within the exception. *See id.* at 1113 (citing *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 445 F.2d 301 (5th Cir. 1971)). The *Donelon* holding was later followed by the Sixth Circuit in *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996).

In *CSX*, using the same logical approach as *Donelon*, the court of appeals held that the FRSA reserved a specific exception to "States" to regulate railway safety. *See id.* at 628. The court was clear that because the City of Plymouth was not a *State* as defined by the statute, its ordinance was preempted even though it was targeted specifically at safety. *See id.* The court of appeals in *CSX* came to this conclusion despite the fact that the City of Plymouth was acting under an express delegation of authority from the State. *CSX*, 86 F.3d at 628 (citing *CSX Transp., Inc. v. City of Thorsby*, 741 F.Supp. 889, 891 (M.D. Ala. 1990) ("It is a city ordinance and not a state law or regulation which is at issue. The fact that the city may have acted on delegated [State] authority does not detract from . . . this dispositive fact."). As the United States pointed out in support of Petitioners', cities "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." Brief of Amicus Curiae United States at 11 (quoting *Wisconsin*

---

[8] Pub. L. No. 91-458, Title II, 84 Stat. 1705 (Oct. 24, 1978), codified as amended at 49 U.S.C. § 20101 *et. seq.*

Pub. Intervenor v. Mortier, 501 U.S. 597, 607-08 (1991)).[9] This fact bolsters the point made by the Ninth Circuit in *Tocher* that to adopt Petitioners' construction would "lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *Tocher*, 219 F.3d at 1051.[10]

Further, to adopt Petitioners' construction, it would be unnecessary to ever define "State" as including political subdivisions. In the ICCTA, Congress found it necessary, however, to define "State" without including political subdivisions. Petitioners' construction would require this Court to disregard two well-recognized canons of statutory construction requiring courts to (1) give similar language in the same statutory section consistent meaning and (2) all words in a statute should be given effect. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

Petitioners' construction becomes more untenable given that, as pointed out by amicus United States, Congress altered the definition of "State" to *include* political subdivisions within the same statute. Brief of Amicus Curiae United States at 18. This confirms that Congress was well aware that the definition of "State" at § 13102(18) excluded political subdivisions. Otherwise, it would have been unnecessary for Congress to expressly alter the definition of "State" for purposes of specific statutory sections. *See, e.g.*, 49 U.S.C. § 31132(7)-(9). As noted by the United States with respect to § 31141,

---

[9] It is instructive that neither Petitioner nor amici in support of Petitioner allege that specific authorization by state statute or state constitution in any way requires a different analysis or compels a different result than if the local government regulated pursuant to its general self-governing authority.

[10] There are certainly occasions, like that in § 14501(c)(2)(A), on which Congress may wish to preempt regulation by political subdivisions while leaving the States' regulatory authority intact. *See generally, Mortier*, 501 U.S. at 616 (opinion of Scalia, J.) (recognizing that in certain circumstances it could make "eminent sense" to authorize regulation by States but not political subdivisions).

Congress' express language "should not be deemed superfluous absent very clear evidence that such was Congress' intent." Brief of Amicus Curiae United States at 19-20.

Finally, Petitioner's construction also ignores the phrase "with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). Petitioner and their amici contend that Petitioner's regulations are saved from preemption by the so-called "safety exception." Despite the fact that political subdivisions lack authority to regulate pursuant to § 14501(c)(2)(A), Petitioner's contentions demonstrate a further misreading of the exception. First, the exception is more limited than an exception for "public safety." Section 14501(c)(2)(A) clearly allows continued State regulation of *motor vehicle* safety. "Motor vehicle safety" is defined as

> the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.

49 U.S.C. § 30102(a)(8). Thus, Congress narrowed the safety exception with the qualifying phrase "with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A).

The Dallas court of appeals addressed this language:

> Preliminarily, we note that the 'safety exception' is, in part, a misnomer. Rather than being a general exception for safety-related regulation concerning motor carriers, the exception is more narrowly drawn than commonly recognized. . . . Therefore, the preemption provision applies to 'motor carriers,' while the safety exception applies only to 'motor vehicles.' Congress is presumed to choose its words carefully and to mean what it says. We must assume Congress did not mean to exempt all safety regulation pertaining to motor

carriers when it used the more narrow qualifying words, 'motor vehicles.'

Whitten v. Vehicle Removal Corp., 56 S.W.3d 293, 305 (Tex.App.–Dallas 2001, pet. granted).

This is made more clear by the fact that in the same exception Congress reserved authority of States to enact regulations with respect to highway routing of hazardous cargo. Certainly, had Congress intended § 14501(c)(2)(A) to be an all-encompassing general welfare exception, it would have been unnecessary to include reference to hazardous cargo or size and weight restrictions as well. *See Whitten*, 56 S.W.3d at 306 ("If the safety exception in the first clause is read so broadly as to include any regulation touching on safety, it would appear the second clause would clearly be encompassed in the first and, therefore, unnecessary."). Notwithstanding political subdivision's lack of regulatory authority, Petitioners' construction of § 14501(c)(2)(A) ignores the text and attempts to squeeze the square peg of permits, application fees, and record requirements into the round hole of motor vehicle safety.

B. Role of Secretary of Transportation in Statutory Scheme

Amici United States contends that the inclusion of local safety regulation among the provisions the Secretary of Transportation is empowered to review under other regulatory statutes, supports the construction that Congress did not intend to preempt local safety regulation of motor carriers. Brief of Amicus Curiae United States at 20-21. The United States' contention is incorrect for three reasons. First, it ignores the role the Secretary would play in reviewing the many state and local regulations that are not preempted by § 14501(c)(1). While the phrase "related to" is admittedly broad, it does not encompass every state or local law that may affect motor carriers of property. Thus, the Secretary would perform an important function in determining whether regula-

on motor carriers or conflict with the transportation policy of the United States pursuant to 49 U.S.C. § 13101.

Second, it ignores the Secretary's function in reviewing regulations that are not preempted regarding *other* types of motor carriers, including motor carriers of passengers and freight forwarders and brokers. 49 U.S.C § 14501(a) & (b). The Secretary may review laws enacted by a *State* pursuant to § 14501(c)(2)(A) and determine that they impose unreasonable burdens or have "unacceptable economic effects" upon motor carriers of property. The fact that the Secretary retains authority to review local safety laws *affecting* motor carriers does not require a finding that Congress did not intend to preempt local regulations.

Third and finally, it fails to acknowledge the exception to the Secretary's jurisdiction limiting the same review power urged by amici in two specific areas significant to companies involved in the removal and storage of motor vehicles. Section 13506(b) restricts the jurisdiction of the Secretary and Surface Transportation Board from exercising jurisdiction over (1) transportation provided entirely in a municipality and (2) the emergency towing of a wrecked or disabled vehicle. 49 U.S.C. § 13506(b)(1) & (3). Thus, in many instances involving regulation of towing companies, the Secretary lacks specific jurisdiction to perform the very review and coordination tasks Petitioners and amicus United States seek to use as evidence that Congress did not intend to preempt local regulation of motor carriers. See Brief of Amicus Curiae United States at 27.[11]

---

[11] Petitioners and amicus United States also rely on a Department of Transportation memorandum authored shortly after the passage what would become § 14501(c)(1). See Brief of Petitioners at 31 & D-3; Brief of Amicus Curiae United States at 25-26. Respondents have addressed the substantive weight that this memorandum should be afforded. Amici would also point out the following: (1) the memorandum was issued prior to the passage of the express exception specific to towing companies at § 14501(c)(2)(C); and, (2) the memorandum speaks of "State actions legitimately grounded in pub-

Therefore, because Congress expressly preempted State and local regulations related to the prices, routes, or services of motor carriers of property, provided a specific definition of "State" for purposes of the ICCTA, and intentionally omitted reference to political subdivisions in § 14501(c)(2)(A), it is clear from the text that Congress did not intend to permit continued local regulation of motor carriers of property.

C. Court of Appeals' Construction Furthers Congress' Deregulatory Purpose

In addition to the text, the Sixth Circuit's holding, along with the construction of § 14501(c)(2)(A) adopted by the Fifth, Ninth and Eleventh Circuits, furthers Congress' express purpose of deregulating the motor carrier industry. With regard to that purpose, Congress stated:

> Sec. 601. PREEMPTION OF INTRASTATE TRANSPORTATION OF PROPERTY. (a) Findings.- Congress finds and declares that- (1) the regulation of intrastate transportation of property by the States has- (A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers; and (2) certain aspects of the State regulatory process should be preempted.

Pub. L. No. 103-305, 108 Stat. 1569, 1605 (1994).

Construing § 14501(c)(2)(A) in a way that prohibits local regulation while preserving authority to regulate at the State level decreases the number of jurisdictions

---

regulatory authority "with respect to motor vehicles." Further, based upon this memorandum, amicus United States claims that the FAAAA allows States and local governments to continue to regulate "with respect to safety, financial responsibility and other non-economic matters." Brief of Amicus Curiae United States at 25. No party has alleged that insurance and financial responsibility requirements are not "economic regulations" otherwise preempted by § 14501(c)(1).

with which motor carriers must comply allowing motor carriers to adopt more standard business practices. *Mayer*, 158 F.3d at 546. It is clear that Congress was concerned with not only the amount of regulation but the *number of jurisdictions imposing said regulations*. *Petrey*, 246 F.3d at 563 (purpose of statute encouragement of market forces by elimination of a myriad of complicated and conflicting regulations); *Stucky*, 260 F.3d at 444 (legislative purpose [in enacting 14501(c)(1)] was to increase competition by eliminating overlapping and potentially inconsistent local regulations . . ."); *Tocher*, 219 F.3d at 1048 ("Congress recognized that dispersing regulatory authority over motor carriers would require a towing company to adhere to a multitude of different regulatory schemes in every locality where it conducted business . . ."); *Mayer*, 158 F.3d at 546 ("The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.").

Further, despite the dubious conclusion reached in *Ace* that Congress only intended to preempt state and local "economic" regulations as opposed to "safety" regulations, Petitioners' construction would allow cities and counties to enact and enforce "economic" regulations in the form of minimum insurance and financial responsibility requirements. This fact undermines Petitioners' contention that § 14501(c)(2)(A) preserves the authority of political subdivisions to regulate motor carriers. *Stucky*, 260 F.3d at 446 ("[T]here is no stopping point for the potential reach of the safety exemption. . . . We do not believe Congress created § 14501(c)(2)(A) to be a loophole through which local governments could avoid the general preemptive reach of § 14501(c)(1).").

Congress' intent with regard to deregulation was further illuminated by its statement accompanying the passage of the price exception for non-consensual tows. The purpose could not be more clear:

> [To] provide a new exemption from the preemption of State regulation of intrastate transportation relating to the *price* of non-consensual tow truck

> services. This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and is *not intended to permit reregulation of any other aspect of tow truck operations.*

H.R. Rep. No. 104-311, at 119-20 (1995), *reprinted in* 1996 U.S.C.C.A.N. 793, 831-32 (emphasis added). Once again, Congress expressly referred to the authority of political subdivisions in addition to the authority of States. Once again, had Congress intended *States* to encompass authority of political subdivisions, the inclusion of the language in the statutory exception at § 14501(c)(2)(C) would be unnecessary.[12]

Finally, logic dictates that Congress did not enact a deregulatory statute with sweeping preemption language and in doing so subject all motor carriers of property to thousands of separate jurisdictions with the authority to require, among other things, different amounts of liability insurance; different qualifications for owners and drivers; and different equipment for trucks. Thus, Petitioners' construction frustrates Congress' express deregulatory purpose, while the Fifth, Sixth, Ninth and Eleventh Circuits' construction furthers Congress' purpose while acknowledging Congress' desire to reserve to States the ability to use its regulatory authority over motor vehicles to address safety concerns.

---

[12] It should be noted that the Senate was well aware of the importance of the specific language when it adopted § 14501(c)(2)(C). An amendment was offered by Senator Hutchison that would have allowed States and political subdivisions to regulate prices *and related conditions* of non-consensual tows. H.R. Rep. 104-311 at 120 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 832. The amendment was rejected by the conference committee. H.R. Rep. No. 104-311 at 119-20 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793-831-32 ("The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.").

D. *Mortier* Does Not Mandate Contrary Result

Petitioners, amicus United States, and the Second Circuit in *Ace*, rely heavily on this Court's decision in *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) to support its construction that § 14501(c)(2)(A) allows local regulation of motor carriers. *Mortier* is inapposite and does not mandate the result urged by Petitioners.

First, *Mortier* dealt with a statute, the Federal Insecticide, Fungicide, and Rodenticide Act[13] ("FIFRA"), which did not seek to supplant State or local authority by its express terms. *Mortier*, 501 U.S. at 606. This Court made clear that FIFRA did not preempt State law in the area of insecticide regulation by express, field, or conflict preemption. *Id.*

FIFRA specifically called for a partnership between the EPA and State and local governments in monitoring and enforcing FIFRA. *Id.* at 615. The Court explained that FIFRA actually encouraged additional State and local regulation. *Id.* at 607. *See also id.* at 614 ("the statute leaves ample room for States and localities to supplement federal efforts"). Obviously, 7 U.S.C. § 136 *et seq.* is distinguishable from 49 U.S.C. § 14501, which leaves no room for State or local regulation save for the narrow exceptions found at § 14501(c)(2)(A) and (c)(2)(C).

Congress expressly preempted state and local regulation of intrastate property transportation in plain ordinary language. *See* 49 U.S.C. § 14501(c)(1). That was not the case with FIFRA. *Mortier*, 501 U.S. at 606 ("FIFRA nowhere expressly supersedes local regulation of pesticide use."). Thus, FIFRA and § 14501(c)(1) were enacted to serve distinctly different purposes.

FIFRA is also distinguishable from § 14501 in that FIFRA is a public safety regimen that was expanded, *i.e.*, made more restrictive, by amendments in 1972. *Mortier*, 501 U.S. at 601 ("1972 amendments transformed FIFRA . . . into a comprehensive regulatory statute.") (internal

---

[13] 7 U.S.C.A. § 136 *et.seq.* (1972).

quotations omitted). FIFRA also included provisions authorizing the EPA director to delegate certain enforcement actions to State and local governmental entities. *Mortier*, 501 U.S. at 601-02, 608. Section 14501, on the other hand, is a deregulatory statute. It strips authority from States and political subdivisions with regard to motor carriers of property completely save for narrowly and carefully crafted exceptions. *See* 49 U.S.C. § 14501(c). No partnership is intended and no room for supplementation is afforded.

In *Mortier*, this Court rejected the construction that States were prohibited from delegating authority to political subdivisions under FIFRA despite Congress' exclusive definition of State because *all other factors* utilized in determining Congress' intent recommended against such a construction. FIFRA lacked the "explicit pre-emptive language" necessary to overcome the presumption against federal preemption of State laws. *Mortier*, 501 U.S. at 605. What FIFRA lacked, § 14501 contains in abundance. In addition to the plain language of the express preemption provision, every interpretive tool at this Court's disposal counsels in favor of finding that Congress intended to prohibit local regulation of motor carriers of property. As a result, the court of appeals was correct, as was the Fifth, Ninth, and Eleventh Circuits, in holding that § 14501(c)(2)(A) does not allow regulation of motor carriers by political subdivisions.

IV. WRECK CHASING

Petitioners and their amici stress the need for local regulation to address the perceived problem of "wreck chasing." See Brief of Petitioners at 5-6; Brief of Amicus Curiae City of Dallas at 1-2. Petitioners complain that if cities are preempted under 49 U.S.C. § 14501(c) from regulating towing companies, they will have no means by which to combat "wreck chasing." This assertion is unfounded. Petitioners, like all cities, have means to combat wreck chasing through enforcement of generally applicable traffic laws. Like all motor carriers and motor

vehicle operators using the public roadways, tow truck operators are subject to general state licensing and traffic laws.

Notably, Petitioner, City of Columbus, does not require the licensing of tow truck operators who only perform tows from the scene of accidents within the city, but requires Columbus' tow truck operators to obtain a license regardless of the type of tow they perform or the location from where the tow takes place. *See* Columbus, Ohio, City Code § 549.02. In addition, amicus City of Dallas has an entire chapter of its city code devoted to regulating nonconsensual tows, despite the fact that it has a separate chapter devoted specifically to regulating tows from accident scenes. *Compare* Dallas City Code Chapter 48A (regulates all towing companies that operate within city limits including setting maximum price for nonconsensual tow) *with* Dallas City Code Chapter 15D (regulates towing from accident scenes within city limits). As previously stated, private property towing initiates through a contractual relationship between the party requesting the tow and the tow company. Because of this relationship, there is no need on the part of Petitioners to regulate private market participants engaging in commerce.

Finally, to the extent "wreck chasing" presents a perceived safety problem, States are free to enact and enforce generally applicable traffic laws that address safety concerns. Drivers who receive too many citations for speeding, for instance, are subject to driver's license suspension or revocation, as well as denial of liability insurance in the free market. In addition, States are free to enact or enforce laws regarding accident scenes such as the requirement to obey the lawful orders of a peace officer, or a prohibition on hindering a peace officer's investigation at an accident scene. In any case, Congress was aware of "wreck chasing" when it passed § 14501(c)(1). Congress reserved to the States adequate authority to address these traffic safety concerns while maintaining its express purpose of deregulating the motor carrier industry and creating a free market for towing